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See "The Lawyer from Ketchikan" on page 498

MAY 1960 · Volume 46 · Number 5

American Bar Association JOURNAL

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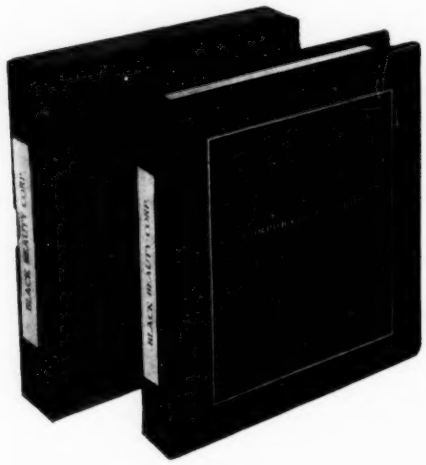

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May, 1960

VOLUME 46
No. 5

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Second class postage paid at Chicago, Illinois.

Price per copy, 75c; to Members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00; to Members of the American Law Student Association, $1.50.

Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

POSTMASTER: Send notices by Form 3579 to AMERICAN BAR ASSOCIATION, 1155 East 60th Street, Chicago 37, Illinois.

Fact and Fiction About Court Delay: a One Minute Quiz

1. The Jury System
There is little room for time saving through shortening of jury trials; only their abolishment would sharply curtail delay.
True ☐ False ☐

2. The Bar
The concentration of the trial bar is a major cause of delay. True ☐ False ☐

3. Judges
Judges who work fewer court days make up for it by working longer hours.
True ☐ False ☐

4. Insurance Companies
If insurance companies were forced to pay interest from the day of accident rather than the day of verdict, more cases would be settled.
True ☐ False ☐

5. Pre-Trial
Since pre-tried cases are less likely to reach the trial stage, pre-trial will reduce court delay.
True ☐ False ☐

6. Adjournments
Every adjournment inevitably increases court delay. True ☐ False ☐

7. Auditors and Referees
Since Massachusetts and Pennsylvania effectively reduced their delay through auditors and arbitrators, these systems are recommended cures for delay. True ☐ False ☐

8. Split Trial
If the courts were to limit the issue first to the trial of liability, and try damages only if the jury affirmed liability, a substantial reduction of delay would result. True ☐ False ☐

The Answer to all questions but the last is . . FALSE! Details can be found on: p. 82 (1), p. 195 (2), p. 186 (3), p. 128 (4), p. 141 (5), p. 53 (6), p. 219 (7), p. 99 (8)

in

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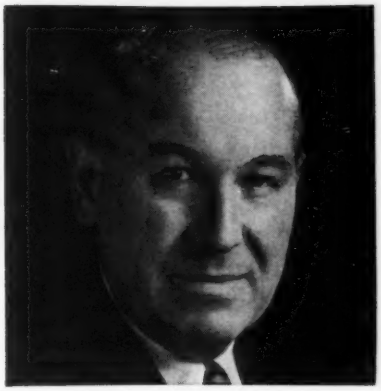
The President's Page

John D. Randall



One cannot serve as President of the American Bar Association without becoming deeply impressed by the sense of professional and social responsibility displayed by his fellow lawyers. As I have traveled through the United States, I have found each of the bar associations active in the public interest as well as loyal to the principles for which the organized Bar stands.

The emphasis of my conversations since the Midyear Meeting has been in furtherance of the many important matters considered and acted upon by the House of Delegates at that time. At the same time, I have attempted to interpret to the public the organized Bar and its policies.

While in Hawaii in the early part of March, we discovered that the Hawaiian Bar was becoming more active, more energetic and more influential in the life of the new state. During our visit, the Western Interstate Bar Council, composed of representatives of ten of the Western states, held its meeting at Honolulu. The exchange of ideas at this meeting was most stimulating and undoubtedly will benefit both the state and local bar associations that were represented there. In a speech delivered before the joint luncheon meeting of the Western Interstate Bar Council and the Bar Association of Hawaii, I discussed the American lawyer as America's family counselor, and pointed out that while the lawyer has a significant role to play in government, business and international affairs, his work as counselor to America's families, though less dramatic, is perhaps of greater social significance in the long run.

Two weeks after my return from Hawaii, I made the traditional trip of the President to California where I addressed the San Francisco Bar Association, the Los Angeles Bar Association, the Bar Association of San Diego, and the Annual Meeting of the American College of Trial Lawyers. The emphasis of my discussions on the West Coast was placed on the matter of legal fees and with specific attention paid to the problem of providing legal services to all sections of our American population regardless of economic condition or status. I pointed out the immense contributions made by the Legal Aid Associations and the Legal Defender groups throughout our country, as well as the services rendered by volunteer lawyers who often receive no compensation. I discussed the contingent fee and explained that it was subject to several limitations imposed by statutes, by courts and by the Canons of Ethics of the organized Bar. Implicit in this analysis was the fact that the contingent fee system properly administered represents the most effective way of assuring every litigant that if he has reasonable grounds he will have his day in court.

I also commented on the prepaid legal care proposals as well as some of the other plans advanced to assist our marginal income groups in securing adequate legal service. This is a field which warrants further study and I encouraged bar associations to pursue their work on the matter.

Similar in vein is the question of providing legal care for the aged. Do the aged have special legal problems? If so, are there special economic considerations which make it more difficult to secure counsel? It might very well be that the Bar should examine this area to determine whether a problem exists.

From the Annual Meeting of the American College of Trial Lawyers I traveled to Chandler, Arizona, for the Annual Meeting of the State Bar of Arizona. Once again I had the occasion to meet with the leaders of the State Bar of Arizona and to discuss with them problems of mutual interest, and as has been the case so often, I came away deeply impressed by the dedication to the ideas of proficiency and professional responsibility reflected by the State Bar of Arizona.

On April 9, I addressed the Association of Insurance Attorneys in St. Louis. At this meeting I underlined the importance of maintaining intact the attorney-client relationship. I pointed out that if an independent adjuster recommends to his employer that the employer engage one attorney rather than another, the adjuster becomes an intermediary between the attorney and his client.

As in the past, our trip was marked by many courtesies and we are most appreciative. Typical of the special considerations shown was the kind act performed by the Queen's Bench, the organization of women lawyers in San Francisco, which cut short its regular meeting in order to permit a reception to be held in our honor.

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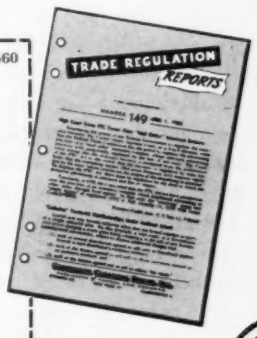

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Careless Driving Is Anti-Social

I am only the wife of a lawyer (and former State's Attorney) but would like to be allowed to express my thanks to you for the article, "Courts and Prosecutors Are the Weak Link in Preventing Drunken Driving".

All too true! But we laymen should also be blamed for any laxness in the prosecution of careless drivers. The attitude of the judges and the prosecutors, though a cause of further trouble, is itself a symptom and effect of our own public's attitude of apathy or over-tolerance towards excessive self-indulgence of the individual on the public roads.

Is this attitude perhaps inevitable in a social system where so little emphasis is laid on the individual's social conscience? When we overextol the concept of competition of the individual person or private group, against the other individual persons or private groups, and underemphasize the social facts of co-existence and collaboration, are we able enough—or willing enough—to see ourselves as responsible, each and all, for the use, or abuse, of our shared rights on the public highways?

Careless driving is anti-social. But how can we hope to control this all-too-natural behavior more effectively until we see it more distinctly—not as just the naughtiness of children, out-racing "the Law", but as socially amoral conduct—and accordingly exact from careless drivers more substantial and sobering payments to society (including, perhaps, even volunteered Blood Bank donations)?

And couldn't our judges and state's attorneys—so highly trained for defining relationships of man to man and of man to society—try harder to enable us all to see ourselves more consciously as not merely individuals existing in a state of competition, one against the others as to who shall out-speed or outsmart all the others, but as individuals in a state of interdependence and of interresponsibility?

JESSIE MCPHERSON ORGAIN

Island Pond, Vermont

P. S. Grateful thanks for your support of the International Court of Justice, and specifically, your recommendation of withdrawal of the disabling Connally Amendment.

"Rule of Law" Only a Dream

In the March 15 issue of the *American Bar News* a brief account is given of the discussions over the proposal to repeal the Connally Reservation to our adherence to the World Court.

The mere fact that the members of the House of Delegates were seriously divided in opinion upon this matter fills one with alarm. What guarantee will the country have that our domestic affairs will not soon be run by others than ourselves and for the benefit of others than the people of this country, if we give unlimited jurisdiction to a World Court? Under our national Constitution the states thought they were so limiting the national authority that their internal and domestic affairs would not fall prey to plunder and the filthy paws of national politics, but we see by strained construction and indirection the liberties of our fathers whittled away. What may we expect from a "World Court"? The farmer who once owned his land has lost his liberty through the sophistry that the Congress can by indirection rob him of his rights through the taxing power, not to raise revenue but applied simply as a control. We see in the Court's definition of interstate commerce an open and palpable disposition to serve the needs of politics. These are but two of the less shameful examples.

The courts and the country should remember that constitutions are made for the protection of the minority, and when a change of public opinion is cited to ignore the provisions of the Constitution, which has been done, it is a confession that power and what the majority deem to be politically expedient should be "the law of the land". Unless "law" be defined as "the will of the dominant force", broadly speaking, we have no law. We cannot hope to have the agreements between the states of this country, chiefly written into the Federal Constitution and its amendments, kept or observed. There is no hope of "rule by law". It is but a pleasant dream which every little while turns into a nightmare of reality. The pattern of our foreign policy is shaped by palsied fear and forlorn hope that appeasement and bribery can take the place of the courage our fathers had and the force we fear to use. How ghastly a prospect! Let us as a nation keep our freedom and our arms—despite efforts in high places to deprive us of them.

FORREST ANDREWS

Knoxville, Tennessee

We Must Take the Lead in Building an Orderly World

I have read with much interest the article of Mr. Eustace Seligman, March issue of the JOURNAL, in which he supports the view that "The World Court cannot become a Substitute for War To Remedy Injustice".

(Continued on page 470)

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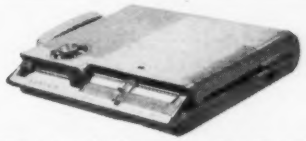

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There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

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■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

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(Continued from page 464)

The writer points out that the Charter does not set up a "method for a nation to enforce its rights if they are violated by another nation". While this general observation may be accurate, it presents a discouraging prospect if we stop at this point and accept the negation that the rule of law can never be inaugurated in the field of international affairs, under the Charter of the United Nations and World Court, and thus become a possible solution for armed conflict.

For a half century and more, American statesmen have been diligent in building a sound basis for the rule of law in international affairs. Every President of our country from McKinley to Eisenhower, and every Secretary of State during that time has endeavored to discover some method for the peaceful adjudication of issues arising between nations.

During this eventful era, our country has been drawn into three world conflicts in the defense of the rule of law. Must we now concede that all we have gained out of this sacrifice is the dubious hope that we may succeed in preventing international strife by military preparedness for peace among nations, or international conferences on the basis of military power, or perchance by extending the powers of the General Assembly of the United Nations?

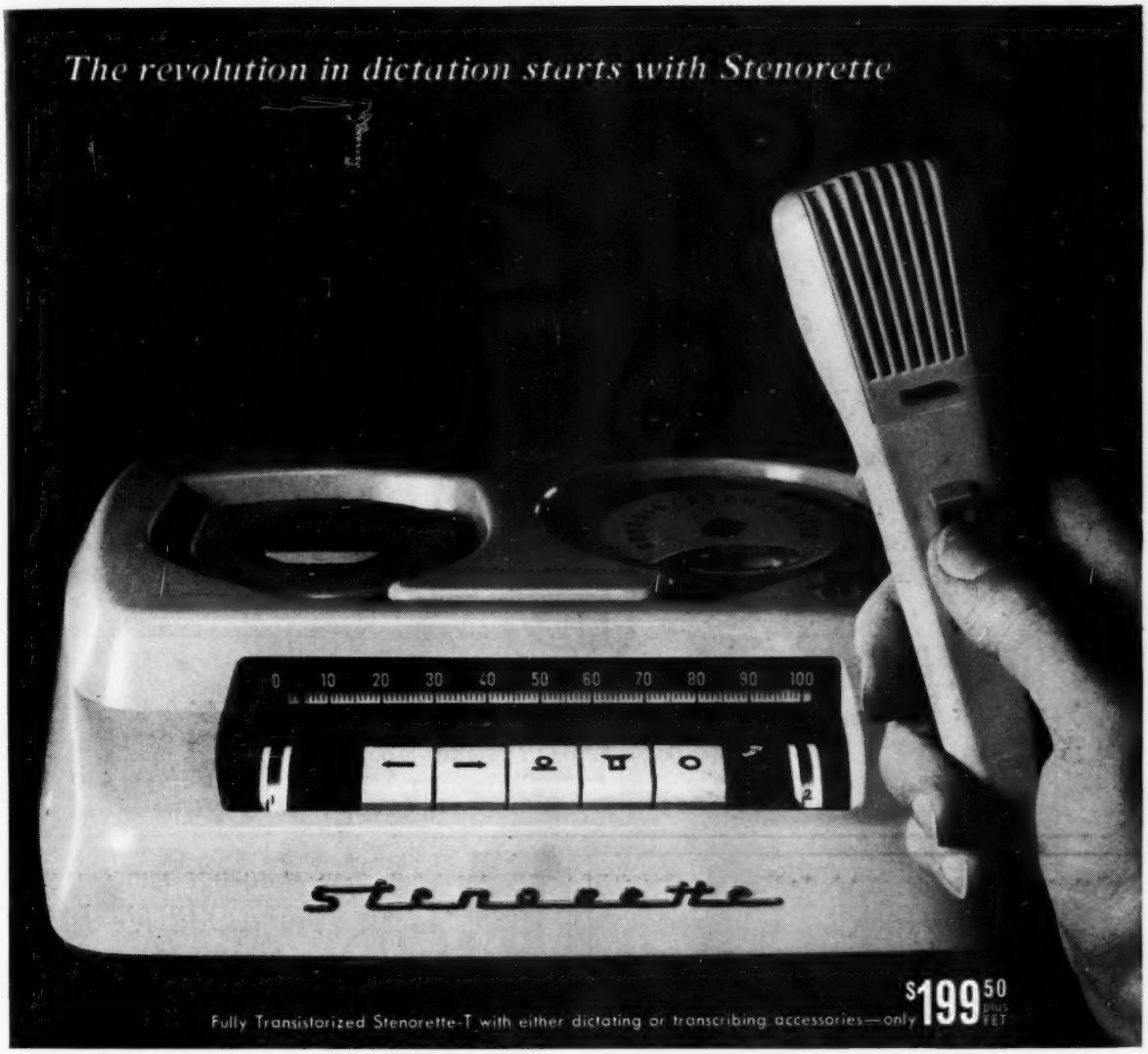
It seems quite clear that the rule of law for the world must rest primarily on legal rather than political considerations. Out of experience in respect to our domestic affairs we have learned that there must be a separation of the powers of government, with the right of judicial review, in order to establish the rule of law within the domain of our country. What we have achieved in respect to our internal sovereignty can be brought about, over a long period of years in relation to our external sovereignty, by working with other nations who wish to contribute to a sound basis for peace.

We feel that the hour has come when our historic ideals and peace-loving objectives should be supported by consistent action. In other words, our idealism and that of all free peoples of the world, sounding in words only, unaccompanied with works, appears to have created a vacuum in the affairs of this planet, having the form of an armed truce, alias, the Cold War.

Experience keeps a great school but the cost is often excessive. What lessons have we learned in his school in the last sixty years? Clearly, one lesson should be that the rule of law for this planet, as prescribed in the Statute of the Court of International Justice, cannot obtain favorable recognition in this country, nor practicable application, by a broadside reservation of jurisdiction of the World Court.

It is pertinent to inquire what would be a practical substitute for the principle of the Root formula, designed at the time for our acceptance of jurisdiction of the original World Court, or

(Continued on page 474)



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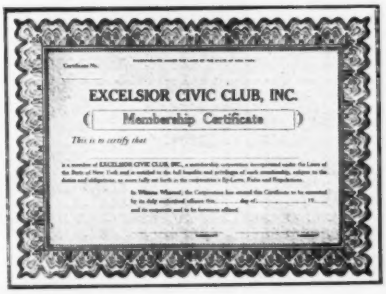

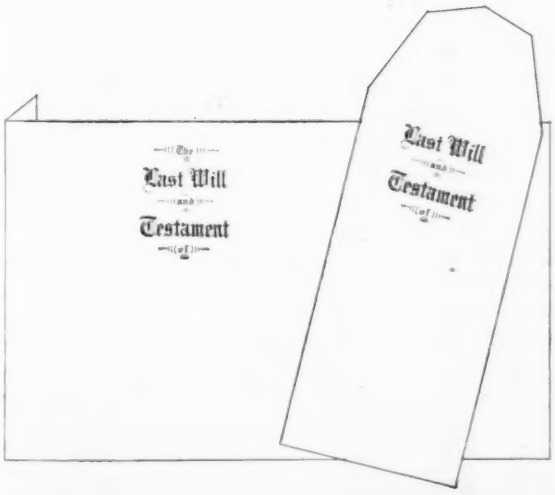

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(Continued from page 470)

as a substitute for the bar of the Connally Amendment to the jurisdictional provision of the World Court as now organized. Hardly is it found in the broadside repudiation of the general principle of reservation of jurisdiction, or a provision, optional or otherwise, which in effect so limits the court's jurisdiction as to seriously impair its standing and confidence throughout the world as a court designed to hear and determine international issues.

We have a suggestion for abetting peace among sovereign powers, which embraces the example of the acorn and its principle of growth, and which is confirmed by numerous other examples. The rule of law for the preservation of order among nations should be and perhaps must be initiated by acceptance or adoption of the law of growth.

Our country can take the lead and, through recognized diplomatic channels, begin negotiations with the free nations, particularly with members of NATO. in acceptable areas, and by stipulation inserted in treaties, or otherwise, consent to the jurisdiction of the World Court to hear and adjudge issues of a justiciable nature, arising within the area of such stipulation or treaty.

Upon confirmation of the agreement of submission, by the respective governments of the parties, the court would be authorized to proceed to hear and determine the issues presented.

What we have said appears to be an oversimplification! However, the point which we wish to emphasize is that there must be a beginning. Our country should take the lead in this matter, and by consent to the jurisdiction of the court, by stipulation, though it be in a limited area, we honor the rule of law by precept and example, and thus contribute something more than lip service to the growth of an orderly world.

AMOS L. CONN

Toledo, Ohio

(Continued on page 478)

(Continued from page 474)

No Surrender to the World Court

It was encouraging to find the article by Mr. Eustace Seligman in your March, 1960, issue. The impression has been growing that the JOURNAL is throwing its influence on the side of delivering our country into the hands of the Philistines.

Mr. Rhyne's advocacy of surrender has been alarming and disappointing to the rank and file of the Bar.

CHARLES E. THOMPSON

McAllen, Texas

Connally Reservation Is Still a Wise Provision

Mr. Clinton, in his article, "The World Court and the United States Domestic Jurisdiction" (February, 1960, JOURNAL) discusses the commitment of the United States to the International Court of Justice in international affairs and the proviso which gives the United States power to withdraw any matter from the Court's jurisdiction if the United States determines that it is a domestic affair. This proviso is called the "Connally Amendment" or "Connally Reservation".

There was a fear that motivated the Connally Reservation in 1946, namely, that the Court, composed of judges with varying international backgrounds, might usurp jurisdiction of domestic matters under the guise of treating international affairs. Anyone who has observed the erosion of state's rights which has occurred over the years by virtue of the decisions of the Supreme Court in interpreting our Constitution has reason to fear a World Court which can determine what is and what is not an international matter.

Mr. Clinton's article has caused me to read the 1946 proceedings of the Assembly and the 1947 proceedings of the House of Delegates and the Assembly in order to determine why the American Bar took the position advocating the repeal of the Connally Amendment. As a matter of fact, I was present in Cleveland in 1947 and if I attended the particular Assembly,

(Continued on page 479)

(Continued from page 478)

perhaps I voted for the repeal on the ground, very reasonable to any lawyer, that a litigant ought not to be a judge in its own case. I am sure there were many others who were equally unenlightened, or equally careless in assessing the implications of a repeal.

The years have made me wiser and more alert to the present danger that faces this country and the world. I feel quite confident that if the Assembly had another opportunity to determine this question, it would reverse itself.

Mr. Clinton emphasizes the point that the World Court has failed to function in any appreciable manner since 1946 and he attributes this failure to the Connally Reservation. He calls the Reservation a "stifling barrier". I would like to point out that the Court still has jurisdiction in the international area discussed in his article. I think that it is a grave injustice to the United States, supporting as it does the principles of the United Nations, for anyone to think that it would arbitrarily withdraw an international dispute under the guise of calling it an essentially domestic matter. It seems to me that to say that our nation would be so lacking in good faith towards our commitment to the Court is to belittle ourselves, not only in our own eyes, but in the eyes of the world.

The Connally Reservation was wise in 1946; in the light of the present danger to our system, it continues to be wise.

LOIS STRAIGHT

Bartlesville, Oklahoma

Shakespeare Book Is Under Consideration

The series you have been running on Shakespeare have been most interesting and entertaining. It covers the period of several months.

Do you plan to publish the articles on the subject in a pamphlet or book form? If so, I should like to purchase a copy and should appreciate your advising me on this.

ROBERT CARLISLE HARDY

Sarasota, Florida

(Continued on page 480)

(Continued from page 479)

He Wants To Trust the World Court

The article written by Eustace Seligman in the March, 1960, JOURNAL entitled "World Court Cannot Become a Substitute for War To Remedy Injustice" deserves a full answer from someone of greater learning and experience than the writer; I hope such an answer will be forthcoming.

Even, however, an elementary knowledge of the big problem facing the world, what Mr. Rhyne has termed the "drift toward destruction", is sufficient to illustrate that Mr. Seligman is oblivious to what a third world war would mean. His example that we might decide to defend Formosa against a decision of the General Assembly and an attack by Communist China is like saying that a man might pull the pin on a hand grenade in hopes that the grenade would not explode. General wars have been started (although not basically caused) by lesser events than a fight of the type suggested.

It is very easy to find reasons for objecting to something that should be done or even that must be done and it appears that that is what Mr. Seligman is doing. The basic premise of his objection seems to be that a world court would render unjust decisions. This seems to be an assumption without any real great foundation. It is quite true that no system of justice is perfect and that in a particular case injustice will sometimes be done. We have many instances of this, but we also have many instances of the case law changing and decisions of courts overturning prior decisions to accomplish the results of justice. I would be far more trusting in the premise that a court will reach a just decision more times than not than I would be that a war fought to resist a decision of the General Assembly or any other fairly constituted body would accomplish the ends of justice.

As Mr. Seligman himself indicates, the alternative suggested by him is indeed "a step backward in our efforts to eliminate war".

ROBERT M. MARTIN, JR.
Dallas, Texas

He Liked the Burns Article

My enthusiastic congratulations to you for your courage, fairness and perspicacity in publishing in the JOURNAL for January the article by Mr. Gerald Burns on "The True Identity of Tennessee Williams".

This is truly superb satire, and perfectly expresses the informed public's opinion of and attitude towards the supporters of the seventeenth Earl of Oxford.

Having overdone your publicity given them, as you did, your publication of Mr. Burns' article restores things to their proper proportions.

MILWARD W. MARTIN
New York City

Needed:

A Bureau of Legal Economics

The *Illinois Courts Bulletin* of February 1, 1960, reports that in 1959 there were 490 persons admitted to the Bar in Illinois. In 1955 the number was 532; in 1950 it was 777. The comment by Richard B. Allen, Counsel for the Illinois State Bar Association, was: "Admissions to the Bar took a sharp drop in 1959 to 490 . . . In this category Illinois is consistent with the rest of the United States, where a decrease in bar admissions is apparent."

Young people fear to become lawyers because the figures they see of average earnings are so distressingly low. If they seek information from the source books readily available, they can find nothing. In the Index to *1960 World Almanac* you cannot find "Lawyers" but you can find three citations to *Lady Chatterley's Lover*. Until 1953 the only history of the American Bar Association a student was likely to find in any library was by a distinguished scholar but every fact in it was wrong!

The legal profession has a vitally important story to tell. It can do so only by collecting the essential facts, keeping them up to date, and making them freely available.

What Alexander Pope wrote in *An Essay on Man* is equally applicable to a profession:

> **Know then thyself, presume not God to scan,**
> **The proper study of mankind is man.**

by Reginald Heber Smith • *of the Massachusetts Bar (Boston)*

LAST SUMMER a Conference on Legal Education was held at the University of Michigan Law School and in the final Consensus it was stated:

> The need of the law profession for a greater share of the highly gifted young men and women is an important problem before this Conference.

In relation to an expanding population, law school registrations are contracting. The summary for the last thirty years is shown in Table I.

To the honor of the young men whose aspirations to become lawyers were interrupted by World War II, let it be recorded that the law school enrollments for the war years were:

1942	9,839	1944	7,465
1943	6,428	1945	10,752

A few months ago an important Conference on Continuing Legal Education for Professional Competence and Responsibility was held at Arden House.

Noah Webster should have been summoned to attend. Happily, through his *Dictionary*, we know what he would have said: It would have been brief and to the point:

> *Competence*—Syn. efficiency.
> Efficiency. 2. Effective operation as measured by a comparison of production with cost in energy, time, money.

Young people with a yearning towards law as a career are worried about overcrowding, they wonder if there is a need for lawyers' services, and they are concerned as to whether they can earn a living.

Let us start with two imaginary bits of correspondence which could easily be true.

I.

> Dear Mr. President—As I live in Iowa I hope you will not mind my appealing to you. I had hoped to go to University of Iowa Law School as you did but all my friends tell me that the legal profession is badly overcrowded.
>
> Will you kindly tell me how many lawyers were admitted to the Bar in 1959 and 1958?

What our beloved John Randall can answer to that I do not know. He will never lie. As to 1959 there has not been much time, but what about 1958? Can it be true that the American Bar Center does not know?[1]

1. The statistics for admissions in 1958 were published by the National Conference of Bar Examiners in March, 1959. An article based on these and prior admission figures has been prepared for the JOURNAL and will be published at an early date.

Table I

Year	Students in Law Schools	United States Population	Law Students For Each 100,000 Inhabitants
1929	43,876	122,000,000	36
1939	33,508	130,000,000	26
1949	57,759	150,000,000	38
1959	42,540	179,000,000	24

(Statistical Note. Statistics as to law school registration vary. The 1959 figure comes from *Journal of Legal Education;* all others from the American Bar Foundation compilation issued November 6, 1958.)

II.

Dear Mr. President-Elect—I am studying at Columbia in the hope of becoming a lawyer. When I talked with my Economics Professor he suggested that we look at "America's Needs and Resources" published by the Twentieth Century Fund whose chairman is a distinguished New York lawyer.

We found chapters devoted to our country's need for doctors and what the medical profession was doing.

We could not find a single reference to lawyers!

This seemed so strange, we inquired further. The answer was—the medical profession will give facts; the legal profession will not.

Could not the American Bar Association afford to have a Bureau of Legal Economics similar to that maintained by the American Medical Association?

What our distinguished Whitney North Seymour would answer, I must leave to him; but I do know that as a successful barrister in tough cases under the Sherman Act he assembles accurate statistical and economic evidence which he uses with telling effect.

It is perfectly true that the *average* income of lawyers is pathetically low. This is an old story. Study after study has revealed it. The saddest fact is that we have done so little about it. There is a strong temptation to emulate the ostrich by refusing to look at facts and, in self-justification, to proclaim "we are engaged in a profession and not a business".

In 1936 the Survey of the Legal Profession in New York County was published. It asserted (page 57):

> More than half of the profession in New York County are in the income class below $3,000 per year; 42½% below the respectable minimum family subsistence level of $2,500 per year; one-third below $2,000 a year; one-sixth below $1,000 and almost one-tenth at or less than $500 per year; and a substantial number are on the verge of starvation with almost ten per cent of the New York City Bar virtually confessed paupers, as indicated by applications for public relief.

In 1938, the American Bar Association's Special Committee on the Economic Condition of the Bar published its monumental report which is well summed up in this paragraph (page 11):

> We do, however, wish to reaffirm our conviction that in the circumstances in which the profession finds itself, with large numbers of lawyers either unable to earn a living in the practice, or earning the barest pittance; with innumerable young lawyers unable to find openings; with many of the older men, after a lifetime of practice, scarcely able to keep going; with substandard proprietary law schools turning out each year thousands of ill prepared and frequently deluded aspirants for admission; with lay agencies, despite the efforts made to check them, encroaching here and there upon the practice in ways which sometimes suggest that the bar itself is deficient in the kind of service which it renders in certain specialized fields; with growing evidence that people in the low income groups frequently go without legal assistance because they cannot afford to pay for it, or because they think they cannot afford to pay for it, or because they distrust lawyers or do not know any lawyers, or do not know when they need advice; with evidence in still other directions that the public relations of the bar are defective; with evidence, finally, that the cost of maintaining law offices is excessively high; in these circumstances we think it imperative that the bar should take action both to get at the facts more fully and to experiment with remedies.
>
> Our final hope is that ultimately there will be established in all the states full-time salaried staffs, working for the profession and under its direction.

In 1941 the New Jersey State Bar Association published its report on Economic Status of the Legal Profession in New Jersey which showed (page 18) how the depression had affected lawyers.

Reginald Heber Smith

Year	Net Income	Year	Net Income
1922	$4,175	1931	$3,475
1925	4,750	1934	2,300
1928	5,350	1937	2,300
		1938	2,425

> This is a much more unfavorable trend than the general population experienced. In New Jersey the average income per family dropped from $3,500 in 1928 to a low of $2,150 in 1934 and rose to $2,600 in 1938. This is a net decline of only 26 per cent as contrasted to 55 per cent in the same period for members of the legal profession.

The New York County Lawyers Survey suggested (page 72) one clue to the underlying trouble by remarking on "the unfortunate tendency of so many lawyers—in their ignorance and helplessness—to duplicate their individual and limited office outfits *ad infinitum*".

The New Jersey Bar Association attempted to follow this clue and to correlate income with status in practice. Its questionnaire asked a lawyer, "Was he an individual practitioner or a partner in a law firm? Was he employed as a lawyer?" and so on. No correlation was possible (page 50) "largely because lawyers defined like situations differently, or dissimilar situations in like terms".

Since 1941 how much has been done

by the organized Bar in working out a commonly understood and commonly accepted terminology that could be used for national surveys, state surveys and surveys at the local level?

The first thorough-going correlation was made by the United States Department of Commerce in its study "Incomes of Lawyers 1929-48" published in Survey of Current Business for August. 1949.

The correlation was somewhat buried in Table No. 7 but the table warrants this statement:

If three lawyers practicing alone in 1947 had joined together, the net income of each would have increased from $5,759 to $12,821 and had they invited two more to round out the team, the net income (before taxes) of each would have risen to $20,467.

This news should have been shouted from the house tops.

But how many lawyers continued to practice all alone? 73.6 per cent. How many lawyers were in firms of five or more? 0.8 per cent.

The American Bar News for January 15, 1957, reported an increase and said "Average income was directly related to size of law firms. Lawyers in firms of five to eight members averaged 'over three times' the earnings of those in sole practice."

The facts are substantiated by the American Bar Foundation's *Report on Lawyers in the United States Part Two: Income* published in 1958.

The reply most commonly heard is "I refuse to be a salaried slave in a law factory in a huge metropolis."

So let us look at the 1956 report of The Iowa State Bar Association on "Incomes of Iowa Lawyers". It says (page 14):

> The higher income lawyers, as well as the specialists, are practicing in firms. The Minnesota survey shows that the larger the firm the larger the income.

When we recall that in our nation as a whole, two out of every three lawyers practice alone, it is especially interesting to note that in Iowa (page 73) the number of lawyers practicing alone was 499 and practicing in firms 599.

The Illinois State Bar Association has just undertaken a complete economic survey. President Snyder in his President's Page in the *Illinois Bar Journal* for November, 1959, writes:

> What's Wrong?
>
> A survey by the United States Department of Commerce discloses that 25 years ago the percentage of the National Income spent for legal services was three times as much as it is today. Twenty-five years ago the legal profession was faced with payroll expenses, rent, and other costs a fraction of our present expenses. The thoughtful young man, who is considering the welfare of an expected family and its position in the Community, is rightfully *concerned* about the economic status of the profession or business he would choose as his life's work.
>
> In spite of the large population increase and the large additional *need* for legal talent in our developing economy, the legal profession is becoming less and less attractive to our young men!
>
> [The italics are President Snyder's.]

There you have it, brother, straight from the shoulder.

Since we are dealing with economics, let us call as a final witness the highly respected National Bureau of Economic Research. Its study on "Trends in Employment in the Service Industries" published in 1956 gives figures (page 108) and asks a question (page 112):

Year	No. of Lawyers per 1000 Population
1900	1.41
1930	1.30
1950	1.20

The layman wonders why complexity of law does not force specialization and more law firms.

An eminent lawyer cannot be a dishonest man. Tell me a man is dishonest, and I will answer he is no lawyer. He cannot be, because he is careless and reckless of justice; the law is not in his heart, is not the standard and rule of his conduct.

—Daniel Webster, Speech before the Charleston, South Carolina, Bar, May 10, 1847

The World Court and the Connally Reservation

Mr. Willy recalls the history of the International Court of Justice and outlines the background of the "Connally Reservation" which has recently become a matter of nationwide debate. He explains why a group of members of the House of Delegates are seeking a rescission of the Association's official position in opposition to the reservation, a stand taken in 1947 at the height of the post-war era of good feeling.

by Roy E. Willy • *of the South Dakota Bar (Sioux Falls)*

ONE OF THE principal purposes of the United Nations is stated to be: "To bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[1] This same object was also the purpose of the League of Nations. Peaceful settlement of international disputes which might, if not so disposed of, lead to the manifold horrors of war has long been the aim of many people and of many nations, including our own.

Unfortunately, in international affairs between nations, as in private transactions between individuals, it still requires two parties to make a bargain, and in the past it has not always been possible to secure the consent of the necessary parties to insure peaceful solution of international disputes. Certainly, in those cases in the not-too-far distant past in which dictatorship has sought to enlarge its scope of influence by extending the territorial boundaries of its country, a peaceful solution could be secured only at the cost of abject and unconditional surrender.

Whether the United Nations can prove any more successful in preventing deliberate acts of aggression on the part of ruthless and predatory dictatorship than its predecessor, the League of Nations, still remains an open question. The issue was presented to the world in the recent Korean struggle where, although there was intervention by the United Nations, a major conflagration was avoided. Whether this same result would have been reached had the forces of the United Nations waged other than limited warfare was not determined.

As an adjunct to the League of Nations, there was created in 1920 a "Permanent Court of International Justice",[2] under provisions contained in the League Covenant. Its jurisdiction depended solely upon the consent and voluntary participation of the parties to a dispute. Its activities were interrupted by the outbreak of hostilities in World War II and in 1946, its existence terminated with the dissolution of the League of Nations.[3]

Historically, the first serious effort to create machinery for the settlement of international disputes by other than armed hostilities occurred in 1899 in connection with the First Hague Conference, at which time the powers who participated in this Conference signed the "Hague Convention for the Pacific Settlement of International Disputes".[4] In 1907 at the Second Hague Conference, a Permanent Court of Arbitration was created, a body that still remains in existence.[5] The extinction of the League of Nations carried with it the Permanent Court of International Justice. This gap in the world judicial organization was filled by the creation of a new judicial structure provided for in the Charter of the United Nations. The form and judicial substance of this organization is almost identical with the old Permanent Court of International Justice and at the first meeting of the new body, it adopted, with few changes, the rules of court of its predecessor.[6]

The present International Court of Justice consists of fifteen judges who, under the provisions of its Charter, are elected by the General Assembly and the Security Council of the United Nations. The judges are chosen from lists of persons submitted by the various national groups who, as members of the United Nations, also belong to the Permanent Court of Arbitration,

References made for statistics quoted are largely taken from the report of a Special Committee of the House Judiciary Committee on the International Court of Justice and the International Criminal Police Organization made to the First Session of the 86th Congress on April, 1959. Reference to this report will be abbreviated H.J.C.

Reference is also made to a publication of the United Nations entitled "The International Court of Justice" in 1957, which is cited as I.C.J.

1. I.C.J., page 1.
2. I.C.J., page 4.
3. I.C.J., page 4.
4. I.C.J., page 3.
5. I.C.J., page 3.
6. I.C.J., page 5.

and in the case of members of the United Nations who do not belong to this court, separate lists are submitted. The General Assembly and the Council each holds a separate election and the successful candidates must obtain a majority of votes from each of these two separate bodies. Judges of the International Court are elected for nine-year terms and are eligible for re-election. Their terms are staggered so that five judges are selected every three years. Provision is also made that in any case before the court in which there is a judge of the same nationality as one of the parties, the other party may choose a person to sit as judge *ad hoc* and if the court contains no judge of the nationality of any of the parties, each party may select a judge *ad hoc* who will serve in that case with the right of participation and vote. Under the Charter, not more than one judge from any member nation can be a member of the court at the same time.[7] The yearly compensation of the judges is $20,000 each and the cost of its administration since its creation in 1946 has been $8,457,000.[8]

Since its organization in 1946, the court has entertained twenty contentious cases[9] and eleven advisory questions have been submitted to it by the United Nations for opinions.[10] However, of the twenty cases presented to the court, in seven the court did not have power to consider because either it lacked jurisdiction or the cases were withdrawn. One was a reconsideration of an earlier case, and two are still pending, making a net of ten cases in which the court has actually rendered a decision on the merits in the thirteen years of its existence.[11] Of the eleven advisory opinions which were submitted to the court, none were concerned with peaceful settlement of disputes.[12] In this respect, its record does not approach that of the old Permanent Court of International Justice created by the League of Nations. In the seventeen years of its active existence, that court dealt with 79 cases, of which 51 were contentious cases referred to it by states either by special agreement or by unilateral application, and 28 arose from requests for advisory opinions submitted by the Council of the League of Nations.[13]

Under Article 93 of its Charter, all members of the United Nations are automatically members of the International Court of Justice. However, no member nation is bound by the compulsory jurisdiction of the court without a specific declaration accepting such jurisdiction. To date thirty-nine member nations have by declaration accepted compulsory jurisdiction by the court in specific areas of international law.[14] None of the Communist block of nations, including the Soviet Union, have accepted the court's compulsory jurisdiction.[15]

In connection with the work of the court, much has been said and much more written about the "Connally Amendment", which came about in 1946 when the United States recognized and accepted the jurisdiction of the court.[16] This acceptance of the jurisdiction of the World Court is subject to a six-word amendment to sub-paragraph (b) which reads: "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States". To this phrase Senator Connally added the words "as determined by the United States". Of thirty-nine nations which have accepted the jurisdiction of the International Court, many of them have likewise placed limitations on the court's power with regard to its jurisdiction. In addition to the domestic jurisdiction reservation, several countries, including the United States, have likewise restricted the applicability of their declarations to "legal disputes hereafter arising". Others have excluded disputes which affect their "national security" and others, disputes arising out of events occurring at a time when they were involved in hostilities.[17]

The Cold War was waiting in the wings in 1946 and had not yet made its appearance on the stage. The House of Delegates had been represented by an official group of observers at the birth of the United Nations. As lawyers, we were well aware of the fact that a feeling existed in the world that the failure of the League of Nations to accomplish its mission of insuring world peace might, in a degree at least, have been due to the failure of the United States to ratify its Covenant. Peace and harmony appeared to prevail throughout the world. There was a strong sentiment to the effect that the Connally Reservation might jeopardize this situation and that the failure of the United States to accept the full jurisdiction of the International Court of Justice without reservation would have an adverse result on the rest of the world. This sentiment in the American Bar Association was responsible for the resolution introduced in the Assembly at the 71st Annual Meeting at Atlantic City in 1946. The resolution contained a recommendation to the effect "that the Senate of the United States should reconsider the subject of the declaration of compulsory jurisdiction, and should eliminate therefrom the right of determination by the United Nations as to what constitutes matters essentially within the domestic jurisdiction".[18] The Resolution was brought before the House of Delegates and action on the resolution was postponed to the Midyear Meeting of 1947.[19] At the 1947 Midyear Meeting, the House of Delegates adopted a resolution embodying the context of the Assembly proposal and recommended that the Senate of the United States "authorize the filing of a further declaration which shall not contain the reservation or condition to which the foregoing resolutions relate".[20] This amended resolution was approved by the Assembly at its 1947 Annual Meeting.[21] The Senate of the United States took no action towards repealing the Connally Reservation and the matter remained more or less dormant until it was brought to attention by a number of prominent individuals, including the present Attorney General.

On March 24, 1959, Senator Humphrey introduced Senate Resolution 94, which re-enacts the resolution of August, 1946, but deletes the six-word amendment proposed by Senator Connally and adopted by the Senate. The matter did not again come before the

7. I.C.J., pages 5 and 6.
8. H.J.C., page 9.
9. H.J.C., page 2.
10. H.J.C., page 2.
11. H.J.C., page 2.
12. H.J.C., page 6.
13. I.C.J., page 5.
14. VITAL ISSUES, Volume IX, No. 6.
15. H.J.C., page 3.
16. Sen. Res. 196, August 2, 1946.
17. H.J.C., page 7.
18. 71 A.B.A. REP. 91.
19. 71 A.B.A. REP. 148.
20. 72 A.B.A. REP. 77.
21. 72 A.B.A. REP. 82.

House of Delegates until the Midyear Meeting at Chicago on February 22, 1960. At that time a resolution was introduced, signed by eleven members of the House of Delegates, the purpose of which was to ask the House to rescind the action taken in 1947 and urge upon the United States Senate the retention of the Connally Reservation. This resolution was not debated before the House on its merits but on motion was referred to a Special Committee on World Peace Through Law.

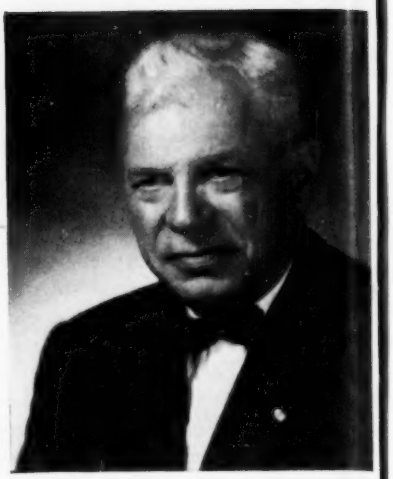
A report of a special committee of the House Judiciary Committee on the International Court of Justice and the International Criminal Police Organization presented at the first session of the 86th Congress uses this language with reference to the Connally Amendment: "The Connally amendment basically is of good purpose. It seeks to safeguard matters which are essentially of domestic concern to the United States. Under the United Nations' Charter, the International Court has jurisdiction only over questions of international law—not domestic matters. It therefore does not seem unwise, in the absence of treaties and any developed principles of international law, that such items of immigration and certain aspects of our postal or atomic energy laws which are essentially domestic matters be reserved to the United States for a decision."[22]

This same report further calls attention to the fact that so far as the special committee could determine, there are no clear cut rules recognized in international law as to what are and what are not domestic issues.[23] Therefore, the United States reserved to itself the right to decide this question in controversies in which it is involved. This possessed the advantage at least of preventing an encroachment on domestic jurisdiction. At the present time the United States is and for many years has been engaged in a world-wide relief program, under which billions of public funds have been expended in military aid, as well as in varied forms of economic assistance to less fortunate nations. Questions involving these voluntary gifts made by this country, made on an international scope, certainly involve questions of purely domestic policy which the United States would not wish to surrender to a Court of International Justice.

The future of the Panama Canal which is vital to the safety and security, as well as economic prosperity of the United States, might easily be determined to be a question of international law by an international court. Our security depends upon its remaining a domestic question, free from possible interference by a hostile international court.

Questions involving immigration have an international aspect but so far as this country is concerned, are purely domestic questions. The retention or discontinuation of the sugar subsidy which has bolstered the economy of Cuba for many years is, so far as the United States is concerned, purely a domestic problem and not one which should be submitted to an international court in the event this country should seek to change, alter or discontinue the subsidies entirely.

The International Court as an instrumentality seeking to maintain world peace is deserving of the support of every lawyer and of every citizen not alone of this country but of the world. The consequences resulting from holocaust possible under an atomic war stagger the imagination. However, there are benefits and privileges which come to the citizens of the United States which we feel are worth retaining and should not be sacrificed as the price of membership in the present International Court. Less than 50 per cent of the present members of the United Nations have accepted the compulsory jurisdiction of the world court. Of those who have accepted, many have done so with one form of reservation or another. Neither Soviet Russia nor any of its satellites have accepted compulsory jurisdiction by the world court. Until the world, or at least a substantial portion of it, including the principal great powers, have accepted compulsory jurisdiction of the world court, the court as such has but little influence in the settlement of disputes between powers, except as the powers themselves voluntarily consent to the court's jurisdiction. If, as and when circumstances should arise that would make it possible for a world court to be a true representative of a judicial



Roy E. Willy was Chairman of the Association's House of Delegates from 1950 to 1952. Born in Chicago, he was educated in the public schools of South Dakota and received his LL.B. from the University of Michigan. He has practiced law in Sioux Falls since 1928. He is a member of the Board of Editors of the JOURNAL.

structure as understood by the English-speaking world, the United States will be jeopardizing this domestic peace, tranquility and security by accepting without the reservation compulsory jurisdiction of the present international court.

It is true that the scope of the court's activities has been severely restricted by virtue of the fact that a majority of its members have never accepted its compulsory jurisdiction. It is doubtful if the Connally Reservation and similar reservations by other complying members have had any material effect on the court's activities. At least the United States and the thirty-eight other nations which have accepted compulsory jurisdiction do submit their international disputes to the court. However, there is no way of compelling non-complying members to accept the court's jurisdiction and no means exist other than by consent of the non-members to acquire jurisdiction over such nations. It is also worthy of note that even the General Assembly of the United Nations has made but small use of the facilities of the

22. H.J.C., page 7.
23. H.J.C., page 8.

court and in the fourteen years of the court's existence has referred but eleven questions to it for advisory opinions. It is unfortunate that the International Court does not have a wider recognition but certainly it is not the Connally Reservation which has deprived it of the opportunity to be of service to the world.

The matter of the Connally Reservation was again brought before the House of Delegates at its Midyear Meeting because of the fact that the failure of the House to reverse the action taken in 1947 is continually cited by those who favor the repeal of the Connally Reservation as representing the present sentiment of the American Bar Association. Those who favor the repeal of the Connally Reservation continually use in their propaganda the fact that the American Bar Association has since 1947 favored its repeal.[24] It is self-evident that this attitude does not represent the unanimous sentiment of either the American Bar or the House of Delegates. The sponsors of the resolution which was presented at the Midyear Meeting and referred to the Committee on World Peace Through Law feel that the members of the House are entitled to an opportunity to consider again the matter fairly on its merits and are confident that this opportunity will be presented to the members at the Washington meeting.

24. "The American Bar Association has consistently opposed it since 1946." VITAL ISSUES, Volume IX, No. 6.

Award of Merit Competition for State and Local Bar Associations

The American Bar Association's Section of Bar Activities has just announced that the 1960 Award of Merit Competition is under way. Entry forms and rules for competition may be obtained by writing Coordination Service, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. All entries must be postmarked by June 15, 1960.

The competition was established twenty-two years ago to pay special tribute to outstanding state and local bar associations. This year awards will be given in five divisions:

(1) State bar associations with more than 2,000 members.

(2) State bar associations with fewer than 2,000 members.

(3) City and county bar associations with more than 800 members.

(4) City and county bar associations with 100 to 800 members.

(5) City and county bar associations with fewer than 100 members.

All bar association officers are invited to publicize the contributions of their association to both the legal profession and the public by entering the competition. Awards will be made during a special ceremony at the 83d Annual Meeting of the American Bar Association in Washington, D. C., on September 1, 1960.

The Cloudy Prospects for "Peace Through Law"

Mr. Briggs declares that the possibility of "peace through law" is being greatly exaggerated. A wealthy, cultured and soft nation may prefer peace, he warns, and, if it can, will promulgate the law to attain it, but a tough, growing nation will not hesitate to use force to gratify its ambitions. There is no international law that will guarantee peace, he argues, and the question in the present world struggle is whose law is to be the law that governs—a question that no world court could settle, especially in a world where nationalism is on the rise in most countries.

by Charles W. Briggs • *of the Minnesota Bar (St. Paul)*

THERE IS DANGER that hopes for "peace and liberty under law" are being exaggerated.

From time to time great social and political explosions in the world produce strange philosophical fall-outs upon the legal mind. One of these is the *nature of law*. Periodically fragments of strife descending upon men become so intense that they become notionate and wishful thinkers about peace on earth. There is a rush to the fetish of rules of law as manna from heaven, to the supreme disregard of practical matters involved. It is good that lawyers check their pragmatic bearings once in a while.

Today it is difficult for some skeptical and inquiring minds to avoid the conclusion that a close examination should be made of concepts back of such slogans as "the Rule of Law", "Peace under Law" and "Liberty under Law". Before we know it we are apt to become involved in occult revelations about the law after the manner of a spiritualistic medium.

Some such apprehension is created by an article entitled "Leader of the Few: A Royal Air Force Background of Law Day", appearing in the April, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL (45 A.B.A.J. 355). The author, on page 370, quotes from Lord Dowding's *Leader of the Few* in part:

> The evidence for the conscious survival of death, and the possibility of intelligent communication between the quick and the dead is in my opinion quite convincing to the open mind . . . I confidently predict that all these ideas will be commonly accepted in a hundred years' time, when those who reject them will be classed with those who now believe that the earth is flat. . . the more we know the better are we qualified to co-operate with the unseen Forces of Light in helping distressed humanity on both sides of the Grave.

The author of the article goes on to say:

> To all skeptics Lord Dowding may well quote Hamlet: "There are more things in Heaven and Earth, Horatio, than are dreamt of in your philosophy", and "There's a divinity that shapes our ends, rough-hew them as we will."

Further this author says:

> The belief of Lord Dowding is not only significant and entitled to respect, but, as appears from the increasing number and variety of spiritual books in the Western World, has been spreading since the nuclear bombs appeared. Aside from the cynics, there appears to be a growing consciousness that the survival of the human race and the civilized part of it, depends on unseen spiritual forces. . . For all these reasons, if "liberty under law" is the hope for a peaceful world, the "Leader of the Few" . . . deserve[s] for our sakes, to be known and remembered by the American Bench and Bar in connection with "Law Day" as a continuity.

The continuity here envisaged is with the school of natural law whose chosen votaries would extract the law from a supernatural authority.

Now, with what indemonstrable assumption is the "Rule of Law" concept to be associated? One answer comes in the May, 1959, issue of the JOURNAL (45 A.B.A.J. 482). It is the dogma of natural law. In an article entitled "The Way of the Law" the author says:

> The question to be answered by philosophy is whether, on the one hand, law is only an accidental product of irrational forces. Or whether, on the other hand, law reflects and must seek to reflect a structure of justice established by the Creator of all things for the right relation of man to man and nation to nation.

Let us quote further from the author:

The classic phrase "natural law" is a stumbling block for many thoughtful people. For others it has most satisfactory meanings, reflecting that structure of justice of which I have spoken.

Again,

> In American thought and feeling the rights of man are not derivable from physical nature nor from any Rousseau-ian theory of noble savage or social compact. *The rights of man are derived from his Creator* [Italics ours].

Also:

> What then is it, this rule of law? It is, as we have noted, a fundamental concept of political philosophy . . .

Then the author would wipe out the privilege of the United States to stay the compulsory jurisdiction of the World Court if in our judgment the matter in dispute involves domestic jurisdiction of the United States. He says:

> Meanwhile there is the World Court of the United Nations—the most unused court in history . . . This means that the Connally Amendment must be repealed.

Within that jurisdiction as an adjunct of a world government we are supposed to attain liberty and peace under the law. And the Law? It must be what to the judges is revealed as a structure of justice established by the Creator.

The Slogans Used Raise Searching Questions

This business of the "Rule of Law" and "Peace under Law" raises very searching questions and points to some areas of serious misunderstandings. Some of these questions it is the purpose of this article in all candor to raise. But as a prologue let us lay down an approach. Most people favor peace as against war, but not "peace at any price".

"We are not too proud to fight" for the defense of our land and the institutions liberty-loving men hold dear. We are not to be misled by emotionalism when we appraise a proposed method of attaining peace. We live in a hard world which gives little or no heed to weakness, humility or unprotected virtue. The practical aspects and workability of any formula for human happiness are always to be thoroughly explored.

First

What is meant by peace? Is peace "freedom from war"? Is it tranquillity enforced by war or the threat of military force? Does Hungary have peace? Do East Germany and the Balkan States? Does it concern civil wars? Do Cuba and Iraq have peace? Is Jugoslavia at peace? Is France? Were the *Pax Romana* and the *Pax Brittania* real conditions of peace, although made possible by legions and warships? Is there "peace under law" where the law is observed under compulsory processes? Very definitely peace to some does not mean the cessation of attempts at conquest nor the end of the "class war".

Second

What is law? This is not a captious question as we shall see.

Mr. Webster says that law is a "rule of conduct which is prescribed or is formally recognized as binding and is enforced by the supreme governing authority", *i.e.*, by a sovereign power.

Now this at first blush seems to be a rather simple matter. But it is that by no means. What is law has been the subject of violent controversy for centuries and centuries. Scholars, lawyers, clerics, philosophers, and even laymen with a flare for dialectics and scholastic mysticism, have divided themselves into two factions.

On the one hand, we have the school of natural law. On the other hand, we have the positivist school. These schools differ sharply and almost irreconcilably on the origin of law.

The naturalists teach that natural law signifies the laws for the direction of human conduct which proceed immediately and infallibly from the Deity. This law is asserted to be an essential and external code which the conscience and rational powers of man are capable of perceiving. We may well amplify the explanation of this concept by referring to the teachings of its devotees. St. Thomas Aquinas, a monk writing in the thirteenth century, founded his legal philosophy squarely and explicitly upon a theological basis. From there he proceeds to arrive at logical sequences and consequences in the field of law by the deductive method of scholastic logic. He taught that law operated throughout the universe as a complete and immutable system. In his system God is the Supreme Ruler; law is derived from Him, and that law is supreme in the state. Lord Chief Justice Coke lived in the seventeenth century. His philosophy of natural law is often referred to by the naturalists as an authority. He said:

> The Law of Nature was before any judicial or municipal law and is immutable. The Law of Nature is that which God, at the time of creation of the nature of man, infused into his heart for his preservation and direction.

Blackstone belonged to the naturalists. He held this:

> When the Supreme Being formed the universe . . . He impressed certain principles upon that matter from which it can never depart. This then is the general significance of law.

But he displayed feet of clay to them when he wrote:

> I know it is generally laid down more largely that acts of Parliament contrary to reason are void, but if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with the authority to control it.

A quotation on the subject from the president of a modern university pretty well sums up the philosophy of the naturalists. He says:

> The Natural Law is not an ideal; it is a reality. It is not the product of men's minds; it is a product of God's will. It is as real and as binding as the statutes in the United States Code. It is not a mere ideal toward which all statutes and court decisions and systems of law should tend; the actuality is that any statute or court decision or system of law which does not conform to Natural Law simply has no valid, binding force; it is inherently vitiated. It lacks an element required for essential validity.

We find also in a report of the 1947

proceedings of the Natural Law Institute this statement:

> Nevertheless, all prescriptions of human reason can have force of law only inasmuch as they are the views and the interpreters of some higher power on which our reason and liberty necessarily depend.

Thus we have the dogma that all rules prescribed for the government of men must be derived from divinely revealed principles. This means interpretation by the human mind. Some Lord Coke is always ready to constitute himself the proper intermediator between Divinity and the governed. If more than one Coke turns up, then there is the eternal conflict of lawgivers. No code of the natural law has ever been written; nor has anyone ever seen a treatise on how the vast body of modern rules of conduct can be traced to immutable principles of that law.

Mr. Felix Oppenheim, in the *American Political Science Review* (Volume 44, No. 4, December, 1950), gives us this summation:

> The Natural Law doctrine is characterized by philosophical absolutism. This absolutism holds that there is such a thing as "absolute reality" which can be communicated by or be understood by man through revelation, intuition, or "right reason"... Absolutism is not tolerant of competing ideas and opinions. So it would seem that *the Naturalist*, being an absolutist, *has a natural affinity for absolutist government, or totalitarianism* [Italics ours].

Now let us take a look at the positivist school of law.

Inasmuch as Justice Oliver Wendell Holmes was one of the most illustrious and trenchant exponents of this point of view, we may present his views as typical. He stood at the end of a road surveyed by other positivists such as Francis Bacon, Thomas Hobbes, John Locke, Jeremy Bentham, Immanuel Kant, David Hume, John Austin, Hegel, James and Dewey.

In his book, *The Common Law*, Justice Holmes drew the following conclusions:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of the nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, as far as it goes, with what is then understood to be convenient.

In this work he further says:

> A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of a *public force*. Just so far as the aid of a public force is given a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity.

The Positivist View— Mr. Justice Holmes

Holmes' positivist legal philosophy may be summed up briefly: He held that judges made law, as do legislators, for in substance the growth of the law is legislative. He never lost sight of the inductive method in declaring the common law. To him "the secret root from which the law draws all the juices of life" are views of what is salutary and feasible for the community concerned. He never questioned the privilege of men to indulge in legislative experimentation to regulate or improve their law. He believed that man, speaking collectively, made his own law; that law is a sovereign's command, and nothing else; that law in a democracy is necessarily the command of the majority of the social group. He maintained that force is the *ultimate ratio* of the law. Inalienable rights he never acknowledged.

In *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, Justice Holmes made the now famous remark:

> The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.

In *Black & White Taxi Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, Justice Holmes said:

> Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it.

Charles W. Briggs was born in Iowa and received his B.A. from the University of Iowa and his LL.B. from Harvard Law School. He was admitted to the Iowa Bar, elected Prosecuting Attorney and practiced there until he entered the military service in World War I. In 1919, he was admitted to the Minnesota Bar and has since engaged in the general practice of law in St. Paul.

Third

Which philosophy is apt to prevail in establishing rules of law, be they for peace or liberty or otherwise?

While we are still in the area of argument, it is pretty safe to conclude that the pragmatic approach of the positivists to the law will be accepted in preference to the approach of the naturalists.

The natural law is not meaningful nor useful in human society for evident reasons:

1. As a dogma it is purely subjective.

Its truth can be tested by standards which can be applied only by the individual making the judgment. It can exist only in the individual mind. From it can be extracted all manner of rules of conduct to suit the interest of the interpreter.

2. The dogma is indemonstrable. It is a pure assumption and a double abstraction.

For most people the value and soundness of rules of conduct can be judged only in their operation as they concern actual facts. These rules are evolved by some sovereignty under whose power is the *ultima ratio*. A conclusion as to the propriety of a rule of law can be reached only by applying standards derived from the value of precedents and expected results.

3. The dogma is devoid of concreteness and determinateness, which are qualities found in the positive law.

It is used to characterize a set of rules of the most patent generality that are claimed to supersede man-made laws. The initial difficulty with the concept of natural law in respect of concreteness arises because (a) No lawgiver exists or is identifiable; (b) No organized power exists to enforce it; (c) It exists in a vacuum.

It is altogether inscrutable.

Fourth

Can we rely upon an assumption that there are absolute and immutable rules of law not dependent upon some sovereign power for promulgation and enforcement?

It would seem not.

If there are such rules they have never come to us except as formulated and expressed by a human mind acting as an interpreter. The question then arises: through what mind? Through a Moses, a Louis XIV, a James I, a Richelieu, or a Thomas Aquinas, proceeding, of course, on the basis of Divine Right or sanction? Or through multiple minds in a democracy?

If we assume that law must have supernatural sanction, then we cannot escape the conclusion that there have always been, and always will be, irreconcilable differences between interpreters of the Divine Will.

Law Proceeds from the Force of the Sovereign

We are not at liberty to reject the teachings of history that rules of law have proceeded from the exercise of sovereign power. Such a power must evaluate, and pass judgment upon divergent human views. It must authoritatively decide what view shall prevail as a positive rule of conduct.

We must realize at the outset that there is no such thing as a choice between the rule of law and the rule of force. Force complements the law as the beginning and end of it—its ultimate sanction. So does history run.

The ancient Israelites put the sword back of the Torah. The judges of Israel never hesitated to use force when the commands of Jehovah were defied. The Ark of the Covenant was at home in an armed camp. In modern Israel, the rule of law as it is revealed there is maintained by military force. In ages past religious wars over interpretations of revealed law have drenched the earth with blood. The Crusades of the Middle Ages were hardly expeditions to establish peace under the rule of law alone. The prophets of Islam broadcast the rules of the Koran by fire and sword. Hindu and Mohammedan look to force to determine whose interpretation of the Divine Law shall prevail. When the Hindu philosophy crosses that of Islam, the next step is the crossing of swords and the arbitrament of war.

Today, all over the world, rules of conduct are laid down by sovereign power. The dove of peace once perched upon a spear; now she must ride in the atomic warhead of a ballistic missile.

The Nuremburg trials were a striking instance of positive law made for the occasion and administered *ex post facto* by sovereign powers to suit their convenience. Vengeance presided as law was improvised to accomplish "justice for the victors". Where is the peace that flowered from that rule of law?

The Founders of this nation understood well that strife can arise over spiritual doctrines. Thus they erected in the first Constitutional Amendment an impenetrable barrier between theology and the law. They said: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." They learned well a sad lesson from endowing any man with power and authority to determine the law by the standards of his religious belief. They were in no mood to re-establish the "Divine Right of Kings" or any similar groundless abstraction. They had ample reason to mistrust judges who claimed to be vicegerents of God with assumed warrants from Him to declare the law. And they appreciated full well that these interpreters of the supernatural were always ready to invoke the desired amount of force to uphold the law they found to be natural.

Fifth

The question then arises: what sovereign power is going to decide what the law shall be and how and by whom it is to be enforced?

The choice is between a world sovereign and independent nations.

If a world government or federation is to discharge these sovereign functions, it must be vested with governmental powers, just as our national government is. If it meets our specifications, it must have a legislator, a court and a sheriff. If the United States becomes a party to such supranational authority, it makes itself subject to the compulsory jurisdiction of that legislator, that court and that sheriff. To the extent of the powers delegated, we should cease to be sovereign and self-governing. Think, if you will, of a world parliament to enact laws binding upon us against our will! Of a world court with compulsory jurisdiction to invade our domestic domain! Of police forces, including military components, to put us under the lash of rules of law, perhaps foreign to our concepts of justice and individual rights!

The Insurmountable Problems of Establishing World Government

Would it not be impossible to establish a supranational government? Impossible, because no one is able to formulate a workable structure for it. Right at the threshold we meet head on insurmountable problems:

(1) How are the peoples of the world to be represented?

(2) What powers are to be delegated?

(3) How are military forces to be assembled, located and commanded?

(4) What are to be the rules for immigration and citizenship qualifications?

(5) What constitutional principles are to be established?

(6) What is to be the philosophy and ideology behind such a government?

There are now and have been widely differing systems of national government throughout the world with equally divergent legal structures. We may enumerate just a few: Mohammedan, Chinese, Hindu, Slavic, Germanic, Anglican, Japanese and Romanesque. Before them came others: Egyptian, Mesopotamian, Hebrew, Greek, Maritime, Roman, and the Papal or Church. (See Wigmore's *The World's Legal Systems.*) Now must be added the Soviet, or Communistic. Each has or had its distinctive rules of law. From this welter how is a supranational legal system to evolve?

The roots of these systems differ. Ideas about moral and personal conduct are in conflict. Religious prejudices are insoluble. Racial backgrounds cannot be effaced. Traditional enmities persist.

Nationalism is ingrained in peoples. It has not lost but gained in fervor throughout the world. It has grown despite erasures of time and space, despite the improvements in transportation and communication. International rivalries have not been lessened. The swifter spread of knowledge concerning rival systems has served to intensify the struggle for national independence and supremacy. Our easier means of evangelism throughout the world have not brought converts to our system but belligerent enemies. Colony after colony has broken away from the mother country. National independence is a battle cry everywhere else. Why all of a sudden should it be feeble in the United States?

Attempts to codify international law have dismally failed. So have attempts at collective security. Plans for organizing, equipping and commanding an international police force died aborning. NATO is a standing example of aversion to yielding sovereignty to a super-government. NATO, however, has been able to carry on through international agreements in pursuance of a common purpose. The signatories prefer to maintain their separate autonomies.

Engagements in armed conflicts since the great alliance of World War II have been carried on by individual sovereign nations, although on one side in the name of U.N.

There is not even a faint hope that a world organization could be created with governmental power to declare or enforce the law.

There is little reason to expect that the nations of the world could establish a world court with compulsory jurisdiction. How could it keep the peace? The long standing and operative causes of war do not constitute justiciable controversies. Nations go to war over problems that no court can settle. Here are a few of them:

(1) Expanding populations;

(2) Commercial rivalries;

(3) Unequal distribution of natural resources;

(4) Conflicting ideologies;

(5) Religious differences;

(6) Traditional enmities;

(7) Lust for power.

Most people prefer peace most of the time. At times they prefer war. They justify war where great principles are at stake. The issues involved in our Revolutionary and Civil Wars could not have been resolved by the peaceful processes of the law and judicial decision. In the *Dred Scott* decision and the hanging of John Brown the law was precisely followed; but they lit the flames of war nevertheless. Oftentimes the passions and prejudices of men are not to be subdued by a rule of law. The Boston Massacre was exonerated in a court of law but it aroused the people to a war for freedom. Recently the law as enunciated by our Supreme Court was enforced at bayonet point. What court could have decided the political issues involved in the outbreak of the First and Second World Wars? The law was silent. There is no international law to speak today effectively for peace.

National power ratings alone get a hearing. "How many divisions has he?" cynically asked the Russian dictator, when a great spiritual force for peace was mentioned.

Law Is the Order of the Master

Who is going to decide that there shall be peace under the rule of law? We may be sure that the wealthy, cultured and soft nation at its zenith will prefer peace and if it can will promulgate the law to attain it. Mature civilizations tend to wallow in pleasures and avoid the sterner virtues that raised them up. The urge to fight wanes. But the tough and growing nation is not averse to conquest in order to gratify its ambitions for wealth and power. The law rides with its armies. Law becomes the order of the master not the supplication of the conquered.

There is nothing in the natural law philosophy that guarantees peace or individual liberty. It can well be and has often been the concomitant of rule by force. This philosophy certainly is compatible with autocracy or the totalitarian state. Today we cannot safely rely upon a belief that liberty will not be lost and that peace will reign if only we hold to the assumption that natural rights to life, liberty and property are inviolable. And surely democracy carries no absolute guaranty of individual liberty. We will preserve liberty only if the people in their sovereign capacity demand it.

The conflicts that array nation against nation today are not differences between systems of law. The controversies that disturb the peace of the world are not concerned with the law of property, of domestic relations, or estates, of tort liability. They are not concerned with the guilt or innocence of a few accused persons or with civil rights of individuals; not with procedural law. They are *concerned with what* sovereign power is to be paramount and supreme. We are skirting the borders of Armageddon while the real question at issue between nations is: whose law is to be the law that governs? That law will not be established by good will, not by persuasions of justice, nor by purchase, nor by "right or reason"; but by predominant sover-

eign power. Did the Russians take their tanks into Hungary to protect a Hungarian rule of law? Are the Chinese Reds going to recognize the Tibetan rule of law? If Russia takes over in Iraq, does she intend to observe the Iraqian rule of law? It ought to be clear that no Communistic nation will ever yield to our system of law and its principles until the present ruling leadership is uprooted by force from within or without.

The plain fact is that the United Nations has been ineffective because it was not endowed with power to do anything either for the maintenance of peace or the conduct of war. Governmental power remains with the signatory nations. The U.N. must look to the exercise of sovereign power by these constituent nations. The sovereignty of each of these nations was left unimpaired. Nothing it does has the character or force of law. Unfortunately, there was created the impression that the U.N. was the perfect instrument for finding, interpreting and applying by moral force to all peoples that great body of immutable and absolute rules and principles of national and international law. Now the disclosure comes that law results from a meeting of minds. There is no consensus in the U.N.: and one independent nation scorns the legal system of the other and its principles. And then comes the imponderable and insoluble difficulty that the peace is broken by political, not judicial questions.

Conclusion

We must abide with independent sovereign nations. World government is only a dream, a fruitless venture into idealism. Think of giving power to a world government to make a declaration of war "to keep the peace" binding upon us and which might well be against our wishes and national interests. And how fantastic it is to think that the rising tide of human passions that break the peace can ever be resolved by a court of law.

Law is the command of a sovereign power. Force is its *ultima ratio*. Law is not a self-generating mechanism; nor is it self-enforcing, as the naturalists would have us believe. We are ruled by positive law which arises from considerations of public policy and social convenience.

Justice Learned Hand says this: "The law must have an authority supreme over the will of the individual, and such an authority can arise only from a background of social acquiescence. . . In essence, law is the conduct which the government, whether it is a king, or a popular assembly, will compel individuals to conform to, or toward which it will at least provide forcible means for securing conformity."

Mr. Justice Holmes concludes: "Just so far as the aid of the public force is given a man he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity." And further: "The life of the law has not been logic: it has been experience. . . The substance of the law at any given time pretty nearly corresponds, as far as it goes, with what is then understood to be convenient."

Roscoe Pound epitomizes the philosophy of law as follows: "But I am skeptical as to the possibility of an absolute judgment. . . Is the end of law anything less than to do whatever may be achieved thereby to satisfy human desires. . . What I do say is, that if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disporportionate sacrifice of other claims, there is *no eternal limitation in the nature of things, there are no bounds imposed* at creation to stand in the way of its doing so."

What Pound implies is that the hand of the supernatural cannot be discovered in the acts of legislatures, in the decisions of courts nor in the orders of administrative boards.

We may well quote here the trenchant words of Mr. Mortimer Adler used at the Notre Dame Law Institute in 1947:

> Nations, like individuals, who live together under Natural Law alone, are in a state of war, whether or not actual shooting is going on. . . However sound morally the precepts of International Law may be, as conclusions deduced from Natural Law they lack the coercive force of Positive Law. International Law is not the kind of law which can keep peace. . . It is not sufficient to ask for a world-wide reign of law. It must be Positive Law. The doctrine of Natural Law does the human face a great disservice if it in any way obscures this fundamental truth by empty eloquence concerning International Law as the foundation of international peace.

Our dire predicament today is due in no small measure to such eloquence and to advocating world government without even as much as blueprinting its framework and the code of positive laws under which it would be expected to operate among the heterogeneous peoples of the earth.

Before any World Court can function in any area, common standards must be arrived at. What would be the source of its law? Is it to be of supernatural origin as the Justices see it? There must be an accepted language which will convey the meaning of the parties, one that will silence the Communistic word twisting.

We must look to the will of the sovereign for the law and in this country the people are sovereign and responsible. Tracing the rules of law to a supernatural authorship is a futile effort. There certainly is nothing celestial about a tax code, a tariff law or a labor law or in the legislative history fostering inflation. What spark of divinity is observable in an order of the Interstate Commerce Commission, in an order of the Federal Trade Commission or in a decision of a court at any level, for that matter? Is the Congress under the aegis of "a brooding omnipresence in the sky"? This whole business of the "rule of law" is unmistakably earthy and man made. If we do not recognize it as such and instead restore a pallid faith in an automatic "rule of law" founded upon the absolutism of Divine revelation, we shall repeat an old mistake. We shall again put on the shackles forged by theological assumptions from which we thought we had freed ourselves. We shall not save the peace and individual liberty, but again put them in jeopardy.

Peace and liberty under law will be with us only if we possess and are willing to exert the sovereign power to preserve them.

A Progress Report:

The Clients' Security Fund Program

In this article, the Chairman of the Association's Committee on Clients' Security Fund reports to the membership on the progress made throughout the country on this phase of the Association's work.

by **Theodore Voorhees** • ***of the Pennsylvania Bar (Philadelphia)***

I. Our Progress

THE YEAR 1959 marks, for most intents and purposes, the real beginning of the Clients' Security Fund as an active project of the organized Bar in this country. During the year, the following developments took place:

In January, the Vermont Bar Association's Clients' Security Fund, the first such fund to be established in the United States, was placed in operation.

In February, the House of Delegates of the American Bar Association adopted a resolution declaring its approval of the principle of the fund and urging all state bar associations to appoint committees to study its feasibility.

In May, the Board of Governors of the Illinois State Bar Association adopted a resolution approving the principle of a fund and appointing a committee to work out the ways and means of establishing it in co-operation with the Chicago Bar Association.

In June, the Philadelphia Bar Association was the second to adopt a resolution putting a clients' security fund in operation in this country.

In August, at an open meeting of the American Bar Association's Clients' Security Fund Committee at Miami Beach, representatives of approximately twenty-five bar associations met and discussed progress on what appears to be a very broad program for the adoption of funds throughout the country. The Committee reported that thirty-four state bar associations have appointed committees to give the matter study.

In September the State Bar of Washington at the annual meeting of its membership voted to establish a security fund.

In October the Bar Associations of Colorado and New Mexico voted to establish funds.

In November the Board of Governors of the Virginia State Bar Association approved the establishment of a fund in principle.

Right after the turn of the year the Pennsylvania Bar Association at the mid-winter meeting of its membership, voted unanimously to establish a fund in Pennsylvania and appropriated $10.000 with which to start it.

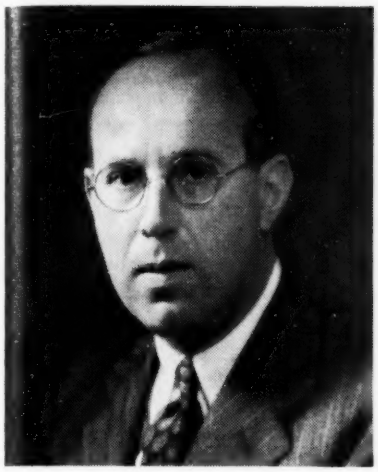
II. Public Relations

Certain questions which have been raised about the clients' security fund were subject to very careful exploration during the past year.

Some attorneys have suggested that the fund constitutes poor public relations; that we should not talk about dishonesty within the profession; and that the subject should be kept entirely under the rug. Some support for this belief or attitude was certainly furnished by the unfriendly press which a proposal to establish the fund in Wisconsin received when the matter came before the state Bar for debate in Milwaukee. The newspaper headlines referred to "cheating lawyers", and the association's membership repelled, if not intimidated, voted not merely to reject the proposal for the fund but to discharge the committee from further study of the subject.

Now, granting that the establishment of the fund may be accompanied by poor publicity and speculation as to the basic necessity for a precautionary effort of this kind, it would obviously be most unlikely that the bar association would obtain a poor press from it more than once. After the establishment of the fund, the next time that there would be any real likelihood of publicity being given to it would be upon the occasion of an embezzlement and, certainly the existence of the fund and the consequent elimination of loss to the public should go far toward ameliorating the bad feeling toward the Bar which inevitably accompanies the disclosure of an attorney's dishonesty.

The American Bar Association's Committee on Clients' Security Fund directed an inquiry to various law societies in other common law countries which have established such funds, to determine their effect on the public relations of the Bar. The replies testified with unanimity as to the improvement in the attitude of the public which followed the establishment of the fund. Three excerpts from the letters we have received may be cited as typical:



Theodore Voorhees, Chairman of the Committee on Clients' Security Fund.

Under date of September 11, 1959, E. B. Lionel, Secretary of the Law Society of Scotland, wrote me:

> I cannot recollect that there was ever any suggestion that by setting up such a Fund for the protection of clients the profession would be thought to be admitting that there was dishonesty within its ranks. Adverse publicity arises when defalcations by solicitors come to the knowledge of the press and this has happened less frequently since the Fund was established and clients compensated for any loss. There is still publicity, of course, in serious cases, where criminal proceedings are taken. There is no doubt in my mind that the existence of our Fund and the payment of grants results in good rather than adverse publicity for the profession.

On September 9, 1959, C. R. Davidson, Q.C., wrote to me with reference to the fund in Saskatchewan as follows:

> During the years of agitation by members of the profession, prior to the establishment of the fund, for the fund, the principal arguments against it were that honest lawyers should not carry the burden for dishonest lawyers; that it was an insult to the honest lawyer to ask that he be bonded in any way, and that it would result in poor publicity along the lines mentioned by you in your letter. Since the fund has been established all of these criticisms appear to have evaporated. I do not know of a single fact that suggests that the public believe that the legal profession accepts the existence of dishonesty within its ranks. I think that all of us now agree that the reverse is the case. We can now say to the public that they are justified in placing confidence in the profession, so much so that the vast majority of honest lawyers are prepared to make good losses to a client through the misconduct of the occasional one who goes wrong. We have never regretted the institution of the fund.

On September 24, 1959, G. N. McBlain, Chairman of the South Africa fund, wrote:

> The Press in this country has always seen fit to give great prominence to news of thefts by lawyers, possibly by way of a back-handed compliment, although I doubt that motive. We felt, eventually, that it was high time that lawyers recognised in a practical manner what the public already knew, i.e. that there are black sheep in our profession, just as there are in any walk of life. It was felt that if we established a Fund as a voluntary act, a Fund which would be built up by our own contributions, then the knowledge of this act would restore the public confidence in the profession. I have no doubt whatever that the establishment of the Fund did have that effect and has led to improved relations so that in general it can be said that the public does not hesitate to entrust money matters to lawyers.

III. Effect of the Fund on Discipline

Another aspect of the fund which has been extensively examined is whether it constitutes a desirable approach to the problem of how to deal with the dishonest lawyer. Some have contended that the only cure for dishonesty is the heavy disciplinary penalty of disbarment. Others have gone so far as to assert that the establishment of a fund might encourage rather than deter the embezzler.

If the plan for the operation of a clients' security fund would allow the client to obtain reimbursement without the disbarment of the defaulting attorney, there might well be a danger that the disciplinary court might indulge in sentimentality and soften the lawyer's punishment on the ground that the fund had taken care of the client and nobody had been really hurt. But no sensible bar association would seriously contemplate the setting up of a fund which would pay off in advance of the establishment of the attorney's embezzlement and the imposition of discipline by the court.

Far from lending encouragement to dishonesty, the establishment of a fund should act as a powerful deterrent. The lawyer who is most likely to embezzle is the one who is reasonably certain that he will be able to get away with it. He may feel that he has his clients, or some of them, under his domination; that he will be able to stall them off; or that, in the event of discovery of his dishonesty, his clients will be persuaded that no purpose would be served in exposing him but rather that their best course would be to bear with him in the hope that restitution would eventually be made. With the establishment of a security fund, however, none of those considerations would have continuing validity. Knowing that the bar association had established a fund for his protection, the client would have nothing to gain by postponing exposure of his dishonest attorney. The latter would certainly be aware of the serious possibility that the existence of the fund would make it likely that his client would expose him and that the fund would push along the disciplinary action.

There is a further and perhaps more important consideration. Today, our courts are notoriously reluctant to impose the drastic penalty of disbarment. A few lawyers are outspoken in their criticism of the failure of the judiciary to provide the public with the protection to which it is entitled, but it is unfortunately true that the Bar generally, and even the organized Bar, rarely voices open criticism of the laxity of the courts in this respect. It seems most unlikely that the Bar would remain passive if that laxity should continue after the establishment of a fund. Furthermore, the trustees of the fund would insist upon opposition being exerted against the reinstatement of an embezzler and his thus obtaining another opportunity to cause a further depletion of the balance in the fund.

IV. The Question of Insurance

During the last year, there has been considerable discussion of the possibility of protecting a clients' security fund through insurance. Outside this

country, all of the funds have been established on a self-insured basis, though several of the funds in the common law countries carry catastrophe insurance with Lloyds. At a reasonable premium, such a policy insures that portion of an embezzlement exceeding $50,000. Obviously, it takes some time to build up the fund to the point where it will be able to take care of the first $50,000 of the loss.

In Vermont, the State Bar Association obtained a very favorable insurance policy from the American Fidelity Company. It protects against losses not exceeding $10,000 in the case of any one lawyer and not exceeding $100,000 all told. The premium, which is paid by the bar association, amounts to two dollars for each member of the Bar within the state. The insurance company has its main office in Montpelier, and it is said that all the lawyers in the state are known to the officers of the company. It does not appear too likely that other state bar associations will obtain policies on such generous terms. The State Bar of Washington, however, will insure its fund according to advice which the American Bar Association has received.

At the request of our committee, the Surety Association, which numbers among its members casualty companies which write approximately 70 per cent of the business in that field, has had a committee which has been giving serious study to the writing of a casualty bond insuring clients' security funds. It is expected that its report will be made public at an early date, and there is basis for hope that it will suggest a bond which will cover the first part of any loss. will contain reasonable upper limitations on the casualty company's liability and will carry a premium within the means of all state bar associations.

Conclusion

It is still too early for any optimist to predict with any feeling of certainty that clients' security funds will be established all over the country, but indications of a trend in that direction do exist today.

With luck, the funds which have already been established should be able to survive the first few years, these being the ones when they may well be under strain. One or two of the funds in the other common law countries have encountered serious depletion when some large embezzlements have occurred, but all of them are meeting the last penny of their obligations. In the United States, we are moving cautiously, and the bar associations are refraining from making commitments that the full amount of restitution will be made in all cases. Until funds are built up to sizeable proportions, such restraint appears wise.

Some lawyers have been critical of this cautious approach, insisting that no fund should be established till full indemnity can be assured. However, a start had to be made somewhere, and no one can furnish the final answers until we have the benefit of our own experience. We have cause for gratification that so many bar associations have been willing to go as far as they have. More will surely follow.

The Lawyer from Ketchikan

Several weeks ago I sent to every member of the American Bar Association a letter requesting help in our effort to build a stronger national association membership this year.

Each member was asked to contact a non-member lawyer friend and to invite him to join the American Bar Association. A membership application form was enclosed. Hundreds of members responded. A valuable gain in membership has resulted.

But if every Association member could have read the mail I received I'm sure a great many more would have responded. One letter in particular stood out. It was from a practicing lawyer in Ketchikan, Alaska. Here's what he said:

"I'd like to help. But how can I get a new member when every lawyer in town already belongs to the American Bar Association?"

He was right. Every lawyer in Ketchikan is a member. And, interestingly too, we found that the new State of Alaska, one of those farthest removed geographically, has one of the highest percentages of American Bar Association membership of all the states in relationship to the number of its practicing lawyers. Over 75 per cent of all the lawyers in Alaska carry American Bar Association membership cards. The 49th state ranks third among all of the states in this regard.

The moral in this is clear. If every state matched Alaska's record the Association's membership would be far beyond the immediate goal of 100,000.

We are close to that milestone. With *your* help we can reach it very soon. Won't you take a few minutes *now* to contact a non-member lawyer friend and sign him up? If you do, you will be making a valuable contribution to your Association, your profession and to yourself. If you have misplaced the application form sent to you earlier, we will be glad to forward another upon request.

JOHN D. RANDALL
President, American Bar Association

The Right To Treatment

Despite the notable improvement in the treatment of the mentally ill during recent decades, Dr. Birnbaum writes, "there does not appear to have been any significant and realistic consideration given, from a legal viewpoint, to the problem of whether or not the institutionalized mentally ill person receives adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible". This raises a serious social and legal problem, Dr. Birnbaum points out. He argues for recognition of a rule that incarceration by the state in a mental hospital without proper treatment is a deprivation of liberty without due process.

by Morton Birnbaum, M.D. • *of the New York Bar (New York City)*

THE PURPOSE OF this article is to advocate the recognition and enforcement of the legal right of a mentally ill inmate of a public mental institution to adequate medical treatment for his mental illness. For convenience, this right will be referred to as the right to treatment. At present, our law has not recognized this legal right although our society undoubtedly recognizes a moral right to treatment.

As the law has not recognized this right, the state can, and generally does, compel the public mental institution to give inadequate medical treatment to its inmates. The state does this: (A) by compelling the institutionalization of those persons whom it considers to be sufficiently mentally ill to require institutionalization for care and treatment; and, (B) by not appropriating sufficient funds to enable the public mental institution to obtain the number of competent personnel and to maintain the adequate physical plant that is necessary to provide therapeutic, rather than custodial, care for these sick people.

This paper was prepared in part during the 1958-1959 Academic Year while the author was a Research Fellow in the Department of Social Relations of Harvard University and a Post-doctoral Fellow in the Harvard University Training Program for Social Scientists in Medicine. This Training Program is supported by Grant No. 2M-6420 from the National Institute of Mental Health.

If the right to treatment were to be recognized and enforced, it will be shown that the standard of treatment in public mental institutions probably will be raised; however, before discussing the scope and effect of the right to treatment, it will be worthwhile to discuss the need that now exists for the recognition and enforcement of this right.

I. *The Need for the Right to Treatment*

After a person has been institutionalized in a mental institution because it is believed that he is sufficiently mentally ill to require institutionalization, modern medicine may be able to cure him and return him to the community; it may be able to return him to the community even if only improved and not cured; it may be able to return him to the community because he never was sufficiently mentally ill to require institutionalization; it may be able to transfer him to a simple general care institution such as a nursing home; or it may have to decide that the person probably will require long-term or permanent institutionalization in a mental institution.

Modern medicine's efficacy, however, is not based solely on medical knowledge when it treats the mentally ill who are institutionalized in public mental institutions; and, approximately 97.5 per cent of the institutionalized mentally ill are in public mental institutions.[1] In too many cases, the efficacy of modern medicine is dependent upon a legislative decision rather than upon medical knowledge. If the legislature appropriates sufficient funds to enable the public mental institution to provide proper medical care, the effect of institutionalization is decided to a great extent by the limitations of medical knowledge. If the legislature appropriates insufficient funds, the effect of institutionalization is decided to a great extent by legislative fiat.

The following discussion is intended to show that the average inmate of a public mental institution: (A) now receives inadequate medical treatment for his mental illness; and, (B) probably will continue to receive, in the forseeable future, inadequate medical treatment for his mental illness.

1. For statistical data on the institutionalized mentally ill and the institutionalized mentally defective, in both public and private institutions, see the annual publication by the National Institute of Mental Health, Department of Health, Education and Welfare. PATIENTS IN MENTAL INSTITUTIONS (hereinafter cited as PATIENTS IN MENTAL INSTITUTIONS). In 1955, the average daily resident population of public institutions for the mentally ill was 554,100; of private institutions for the mentally ill, it was 13,700. PATIENTS IN MENTAL INSTITUTIONS 1955 (1958). Except for District of Columbia public mental institutions, the public mental institutions surveyed did not include any federal hospital, i.e., Veterans Administration, Armed Forces and Public Health Service hospitals. Approximately two thirds of the private hospitals reported data for these surveys.

A. *The Present Inadequate Treatment*

The fact that the average inmate of a public mental institution receives inadequate treatment is well known to psychiatrists and other persons who work in this field. As Dr. Harry Solomon, Emeritus Professor of Psychiatry at the Harvard Medical School, stated in his Presidential Address delivered at the 1958 Annual Meeting of the American Psychiatric Association:

> After 114 years of effort, in this year 1958, rarely has a state hospital an adequate staff as measured against the minimum standards set by our Association, and these standards represent a compromise between what was thought to be adequate and what it was thought had some possiblity of being realized. Only 15 states have more than 50% of the total number of physicians needed to staff the public mental hospitals according to these standards. On the national average registered nurses are calculated to be only 19.4% adequate, social workers 36.4% and psychologists 65%. Even the least highly trained, the attendants are only 80% adequate. . .
> . . . In many of our hospitals about the best that can be done is to give a physical examination and make a mental note on each patient once a year, and often there is not enough staff to do this much.[2]

As to physical facilities, data extracted from recent government surveys show that in 1958, in approximate numbers, the 545,000 persons institutionalized in non-federal public mental institutions[3] were crowded into institutions that had a capacity of only 520,000 beds, and that of these beds, 35,000 were considered to be non-acceptable on the basis of fire and health hazards[4] by the states in which they were located.

The results of this understaffing and overcrowding can be seen in the information derived from a study conducted by a sociologist, Dr. Ivan Belknap, Professor of Sociology at the University of Texas. This detailed study of one state mental institution—an institution that probably was not atypical—showed that the understaffing and lack of physical facilities caused a social organization that resulted: (1) in custodial, rather than therapeutic, care that was a hindrance both to providing proper treatment and to planning for improvement; and, (2) in the least-trained member of the staff, the ward attendant, rather than the psychiatrist, having the greatest control over the care and treatment of the patients.[5]

No criticism of any state mental institution personnel is intended by these comments for the understaffing and lack of physical facilities are not their doing, but rather are the doing of our society. Our society should be grateful to, rather than adversely critical of, the personnel who continue to work in these institutions under the present trying conditions. Furthermore, it should be realized that the average present-day public mental institution, even if only for custodial care, is a radical improvement over pre-public mental institution care[6] and past public mental institution care.[7]

There is no gainsaying the fact, however, that the average inmate of a public mental institution now receives inadequate medical treatment for his mental illness. Furthermore, due to the fact that there is no realistic planning by the government to meet this problem, it is not probable that this situation will be improved in the forseeable future either as to personnel or physical facilities.

B. *The Probability of Future Inadequate Treatment*

It is probable that, in the forseeable future, the average inmate of a public mental institution will continue to receive inadequate treatment. The reasons for this are: (1) the situation both as to personnel and physical facilities is not being sufficiently corrected at the present time; and, (2) the need for more personnel and physical facilities will continue to be great.

1. *The Situation Is Not Being Sufficiently Corrected*

Although it is true that the number of trained psychiatric personnel, *e.g.*, psychiatrists,[8] is rapidly increasing, it is also true that, primarily for economic reasons,[9] "in our present system it seems unlikely that there can be much improvement in the staffing of our conventional institutions. Our young physicians specializing in psychiatry are not heading toward our large hospitals, nor are the other categories of personnel."[10]

An inkling of how little is being done in regard to improving the inadequate physical facilities can be gathered from an excerpt from a recent study by the Council on Medical Service of the American Medical Association that summarized the situation as follows:

> Increases in the number of acceptable beds for the mentally and chronically ill between the years 1948 and 1957 were very small in comparison with the need as shown by the states. All construction, including Hill-Burton, did not produce enough beds to keep pace with a 20% increase in population much less reduce the "unmet needs" as reported by the states.[11]

2. *The Need Will Continue To Be Great*

It should be realized that in the forseeable future there probably will continue to be a need for more than the present number of personnel and physical facilities. Among the reasons for this are the following: (a) the decrease in the number of institutionalized mentally ill is slow and irregular; (b) this rate of decrease probably will not be speeded up by any new method of treatment; and, (c) an increasing num-

2. Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 7 (1958). For the report from which Dr. Solomon obtained his statistical data, see Joint Information Service of the American Psychiatric Association and the National Association for Mental Health, FACT SHEET NO. 4, ADEQUACY OF FIVE PERSONNEL CATEGORIES IN PUBLIC MENTAL HOSPITALS, 1956, ACCORDING TO AMERICAN PSYCHIATRIC ASSOCIATION STANDARDS, BY STATES (1957) (hereinafter cited as FACT SHEET). The public mental hospitals surveyed included all state, county and psychopathic hospitals for the mentally ill.

3. Provisional data subject to revision prior to final publication. Letter dated April 9, 1959, to Morton Birnbaum from Earl S. Pollack, Chief, Hospital Studies Section, Biometrics Branch, National Institute of Mental Health, Department of Health, Education and Welfare.

4. Bureau of Medical Services, Public Health Service, Department of Health, Education and Welfare, HOSPITAL AND MEDICAL FACILITIES IN THE UNITED STATES ACCORDING TO APPROVED STATE PLANS UNDER TITLE VI OF THE PUBLIC HEALTH SERVICE ACT AS OF JULY 1, 1958, at 1 (mimeographed material, 1958).

5. Belknap, HUMAN PROBLEMS OF A STATE HOSPITAL (1956).

6. Deutsch, THE MENTALLY ILL IN AMERICA (2d ed. 1949).

7. FACT SHEET NO. 1, CHANGES IN PATIENT-EMPLOYEE RATIOS IN PUBLIC (STATE, COUNTY AND PSYCHOPATHIC) MENTAL HOSPITALS IN ALL STATES AND THE UNITED STATES, 1939-1955 (1957).

8. FACT SHEET NO. 10, NUMBER, DISTRIBUTION, AND ACTIVITIES OF PSYCHIATRISTS (1959).

9. L.H.S. (Smith), *Careers in Psychiatry*, 112 AM. J. PSYCHIATRY 305 (1955).

10. Solomon, *supra* note 2, at 7.

11. Council on Medical Service, American Medical Association, THE HILL-BURTON STUDY 25 (1958).

ber of aged persons require institutionalization.

a. *The Decrease Is Slow and Irregular*

Although the number of institutionalized mentally ill is decreasing, the decrease is slow and irregular. For example, in 1955, the average daily resident population of non-federal public mental institutions was 554,100;[12] in 1956, it was 555,104;[13] in 1957, it was 547,634;[14] and, in 1958, it was 547,368.[15]

In connection with these statistics showing recent decreases in the number of inmates in these institutions, the comment by a psychiatrist, Dr. Sidney Sands, should be noted:

> Many psychiatrists and laymen who have been working eagerly to accelerate the discharge rates of our mental hospitals are beginning to view with alarm the results of their labors. No one will argue against the idea of developing techniques and facilities which will shorten the hospital course of new cases and permit so-called chronic cases to return to their homes. Many of us must, however, challenge the naïveté of those who believe we have in fact gained both the techniques and the facilities which justify the present trend of discharging patients from our hospitals. The alarming facts are that we are returning sick patients to homes and communities completely unsuited to deal with the problems.
>
> . . . as time moves on, we are beginning to find out that patients continue to relapse and return to hospitals as before, or that many remain in their communities but are unable to adapt adequately even though their more disturbing symptoms are no longer present!
>
> * * *
>
> Until we know a lot more about so-called mental disease and until we can treat the total person more successfully, let us continue to improve upon what we are able to do and not measure success by chemically induced tranquility and the rate at which we discharge patients from our hospitals.[16]

b. *The Slow Rate Probably Will Not Increase*

Although it is hoped that new methods of treatment will be discovered that will allow a valid rapid increase in the discharge rate of the institutionalized mentally ill, at present, it appears that no such methods are on the horizon; therefore, it should be assumed that the need for more personnel and physical facilities will continue to exist.

It is worth noting at this point that not only is what we consider to be mental illness determined by the norms of our culture,[17] but furthermore that there is a lack of basic knowledge about what we consider to be mental illness. This is especially true about those forms of mental illness that require institutionalization. For although we have learned to prevent many of the major illnesses that are by-products of physical illness such as syphilis and pellagra, a great deal remains to be learned about the major psychoses such as schizophrenia.

c. *An Increasing Number of Aged Require Institutionalization*

There is an increasing number of aged persons being sent to our public mental institutions because there is an increasing number of aged in our population, because our culture tends to reject the aged socially as well as economically and because there is a lack of nursing home facilities.[18]

The foregoing was intended to show that the average inmate of a public mental institution now receives, and probably will continue to receive in the forseeable future, inadequate medical treatment for his mental illness. Some reasons for this inadequate medical treatment will now be discussed.

II. *Some Reasons for This Inadequate Medical Treatment*

Underlying any technical economic discussion of the costs involved in providing adequate medical treatment for the institutionalized mentally ill is a basic philosophical problem. This problem was stated by an economist, Dr. Rashi Fein, in the following manner, when in the course of a recent study of the economics of mental illness on behalf of the Joint Commission on Mental Illness and Health,[19] he made a provocative comment that changes the usual "what should be done" versus "what can be done" argument:

> The final question that we must discuss is: "What *can* society afford to spend on mental illness?" Many of our earlier remarks have suggested the kinds of economic considerations that should be involved in an answer (by society) to the question, "What *should* society spend on mental illness?" The economist cannot answer the first question.
>
> * * *
>
> What society can spend (and ultimately what society should spend) depends on the value system that society holds to. It is obvious that society *can* spend much more on mental illness (or on anything) than it presently is doing. Whether or not it chooses to do so is another question.
>
> We can provide data to assist us in understanding the implications of additional expenditures, the economic benefits to be derived therefrom, the gains.

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12. PATIENTS IN MENTAL INSTITUTIONS 1955 (1958).
13. Letter from Earl S. Pollack, *supra* note 3.
14. Letter from Earl S. Pollack, *supra* note 3.
15. Letter from Earl S. Pollack, *supra* note 3.
16. Sands, *Discharges from Mental Hospitals*, 115 AM. J. PSYCHIATRY 748-50 (1959). To realize that in the past dischargability and treatability have also been confused, see Deutsch, *op. cit. supra* note 6, at 132-57, where he discusses the "cult of curability" that existed in this country in the early 19th century.
17. For a general study of the definitional problem, see Jahoda, CURRENT CONCEPTS OF POSITIVE MENTAL HEALTH (Joint Commission on Mental Illness and Health, Monograph Series No. 1, 1958).
18. Kolb, *The Mental Hospitalization of the Aged: Is It Being Overdone?* 112 AM. J. PSYCHIATRY 627 (1956).
19. Fein, ECONOMICS OF MENTAL ILLNESS (Joint Commission on Mental Illness and Health, Monograph Series No. 2, 1958).

the costs. These may *aid in answering* the question, "What *should* society do?" They do not *answer* the question. The answer is up to society. The question, "What *can* society do?" cannot be answered.[20]

It is submitted that the way our society answers the question of "what can society do" depends on both (A) intrapersonal factors; and, (B) interpersonal factors.

A. *Intrapersonal Factors*

Some of the intrapersonal factors involved have been discussed by a lawyer, Professor Henry Weihofen of the University of Colorado Law School, and a psychiatrist, Dr. Manfred Guttmacher, as follows:

> As Albert Deutsch eloquently put it, "Let thousands of mental patients in the public hospitals of a state exist under terrible conditions of overcrowding; let them be fed with bad food; let them be placed under all sorts of unnecessary restraints; let them lack adequate medical care due to poor therapeutic equipment or an understaffed personnel; let them be housed in dangerous firetraps; let them suffer a thousand and one unnecessary indignities and humiliations, and more like than not, their plight will attract but little attention. The newspapers will maintain a respectful silence; the public will remain ignorant and indifferent. But once let rumor spread about a man or woman illegally committed to a mental hospital and newspaper headlines will scream; the public will seethe with indignation; investigations and punitive expenditures will be demanded." (Deutsch, *The Mentally Ill in America*, 1937, page 418).
>
> This fixation on illegal commitment to the exclusion of the many other tragedies connected with the insane is but another instance of man's neurotic self-interest. Most people defensively feel that insanity can never come to them. An old term for insanity, "alienation", clearly portrays this. It is remote like some decimating plague in distant India. But they can conceive of normal people like themselves being unjustly committed. What may happen to *me* is more important than what is happening to others.[21]

B. *Interpersonal Factors*

Some of the interpersonal factors based on socio-economic class membership were discussed by a psychiatrist, Dr. William A. White, when in discussing the background of the inadequate treatment of the mentally ill, he said:

> [T]he conditions described . . . are primarily attributable, not to the emotional and mental makeups of particular individuals, but to broad-based public attitudes corresponding closely to the general manners and mores and to society's phase of development at each stage of evolution. In the final analysis, too, the effects of such conditions are rather social than individual in their implications.[22]

Of course, these intrapersonal factors and interpersonal factors often intermix, and are often indistinguishable; however, whether one considers these factors to be intrapersonal, interpersonal or both, they are the factors behind our society's decision on the basic philosophical problem of "what can society do". It is submitted that the decision on this philosophical problem will in turn decide the technical legal issue that will now be discussed, *i.e.*, the recognition and enforcement of the right to treatment.

III. *The Scope and Effect of the Right to Treatment*

At the present time, legal thinking in the field of the institutionalized mentally ill[23] seems to limit itself mainly to the admittedly necessary reforming of the substantive and procedural law so that those persons who are institutionalized because it is believed that they are sufficiently mentally ill to require institutionalization for care and treatment are:

(A) Actually sufficiently mentally ill to require institutionalization. This is the lawyer's traditional role for:

> Lawyers are inclined to emphasize the need to guard against "railroading" sane persons into institutions. They therefore stress the importance of a fair trial, with adequate notice and a chance to be heard before being deprived of one's liberty. As a special committee of the American Bar Association said a few years ago, these are "fundamental principles of justice which cannot be ignored. Without them, no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person . . . His sanity is the very thing to be tried."[24]

and,

(B) Because they are sufficiently mentally ill to require institutionalization, considered to be sick people rather than criminals. Accordingly, it is advocated that they be: (1) segregated in mental institutions and not integrated with criminals in penal institutions; and, (2) admitted as patients into these mental institutions rather than being committed as criminals.

These are necessary and worthwhile reforms and have resulted in a more humane treatment of the institutionalized mentally ill; however, there does not appear to have been any significant and realistic consideration given, from a legal viewpoint, to the problem of whether or not the institutionalized mentally ill person receives adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible. Due to the failure to consider any realistic legal solution to this problem, there appears to have been no consideration given to the recognition of any concept similar to the right to treatment. As the law has not recognized any such concept, the state can, and generally does, through inadequate appropriations, compel the public mental institution to give inadequate medical treatment to its inmates.

In effect, the law now says that if an inmate is being kept in a public

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20. *Id.* at 137-38.
21. Guttmacher and Weihofen, PSYCHIATRY AND THE LAW 302 (1952).
22. White, *Introduction*, in Deutsch, *op. cit. supra* note 6, at vii.
23. For the historical background that is necessary for the understanding of our present attitudes toward the mentally ill and for the understanding of our laws affecting the institutionalized mentally ill, see Deutsch, *op. cit. supra* note 6, especially 418-41. For general discussions of the procedures and criteria used to determine which mentally ill need to be institutionalized for their own welfare or the welfare of others, the procedures by which they are institutionalized and the proposed reforms in the present laws affecting the mentally ill, see Guttmacher and Weihofen, *op. cit. supra* note 21, at 288-322; REPORT OF THE ROYAL COMMISSION ON THE LAW RELATING TO MENTAL ILLNESS AND MENTAL DEFICIENCY 1954-1957 (1957); National Institute of Mental Health, Public Health Service, Federal Security Agency, A Draft Act Governing Hospitalization of the Mentally Ill (1951); and, Note, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L. J. 1178 (1947).
24. Guttmacher and Weihofen, *op. cit. supra* note 21, at 288 which quoted from: American Bar Association, *Report of the Special Committee on the Rights of the Mentally Ill*, 72 A. B. A. REP. 289, 293 (1947) that in turn quoted from *In re Wellman*, 3 Kan. App. 100, 103 (1896).

mental institution against his will, he legally can be kept in this institution if: (A) certain formal institutionalization procedures were complied with; (B) he is sufficiently mentally ill to require institutionalization; and, (C) these formal procedures and the determination of being sufficiently mentally ill meet the requirements of due process of law. There is no requirement that he be given adequate medical treatment for his mental illness while he is being institutionalized.

It is proposed in this article that the courts under their traditional powers to protect the constitutional rights of our citizens begin to consider the problem of whether or not a person who has been institutionalized solely because he is sufficiently mentally ill to require institutionalization for care and treatment actually does receive adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible; that the courts do this by means of recognizing and enforcing the right to treatment; and, that the courts do this, independent of any action by any legislature, as a necessary and overdue development of our present concept of due process of law. Many definitions of this necessarily vague concept are available.[25] A useful one for the purposes of this discussion is a definition by Mr. Justice Frankfurter:

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause . . . In applying such a large untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.[26]

If the right to treatment were to be recognized, our substantive constitutional law would then include the concepts that if a person is involuntarily institutionalized in a mental institution because he is sufficiently mentally ill to require institutionalization for care and treatment, he needs, and is entitled to, adequate medical treatment; that being mentally ill is not a crime; that an institution that involuntarily institutionalizes the mentally ill without giving them adequate medical treatment for their mental illness is a mental prison and not a mental hospital; and, that substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison.

If this proposed development is to be achieved, rather than only discussed, the courts must be prepared to hold that if an inmate is being kept in a mental institution against his will, he must be given proper medical treatment or else the inmate can obtain his release at will in spite of the existence or severity of his mental illness. If an inmate were to apply for a writ of habeas corpus to obtain his release, among the issues that he could raise at the hearing could be the questions of whether or not the formal procedures necessary to institutionalize him were complied with, whether or not he is sufficiently mentally ill to require institutionalization or whether or not he is being given adequate medical treatment for his mental illness. If the court decides that the necessary procedures were not complied with, that he is not sufficiently mentally ill or that he is not being given proper medical treatment, he would be released.

The state would still have the absolute discretion to decide whether or not it will keep open its present mental institutions and build new institutions. The state would still have the discretion —limited by the restrictions of due process—to decide whom it wishes to consider sufficiently mentally ill to require institutionalization. The new development is that the state would no longer have the absolute discretion to decide the standard of medical care for the inmates of public mental institutions. If the state wishes to involuntarily institutionalize these sick people for an indefinite period of time, it would have to meet the minimum standards that due process would require.

Admittedly, the proposed method of enforcing the right to treatment would represent a radical innovation in our present legal thinking in the field of mental illness. To release a mentally ill person who requires further institutionalization, solely because he is not being given proper care and treatment, may endanger the health and welfare of many members of the community as well as the health and welfare of the sick person; however, it should always be remembered that the entire danger to, and from, the mentally ill that may occur by releasing them while they still require further institutionalization can be removed simply by our society treating these sick people properly. This is an important reason why the right to treatment is being advocated. For if repeated court decisions constantly remind the public that medical care in public mental institutions is inadequate, not only will the mentally ill be released from their mental prisons, but, it is believed that public opinion will react to force the legislatures to increase appropriations sufficiently to make it possible to provide adequate care and treatment so that the mentally ill will be treated in mental hospitals.

As "most lawyers, by training and practice, are all too apt to turn their interests and their talents toward the finding not the creating of precedents",[27] it would be appropriate at this time to discuss the cases that can be cited as precedents for the recognition and enforcement of the right to treatment; however, from a routine survey it appears that the issue of whether or not there is a right to treatment has never been decided by our courts.[28]

Yet it still remains true as the constitutional authority, Professor Thomas

25. For a collection of numerous definitions of our present concept of due process, see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L. J. 319 (1957).

26. *Solesbee* v. *Balkcom*, 339 U. S. 9, 16 (1950) (dissenting opinion).

27. Douglas, *Stare Decisis*, 49 COL. L. REV. 735 (1949).

28. There is no extended discussion in this article of the legal right of an inmate of a public mental institution to sue for damages for personal injuries resulting from inadequate medical treatment for his mental disorder. If the law recognized this right, it would be another indirect method of compelling adequate

Reed Powell of Harvard Law School, pointed out in discussing compulsory vaccination[29] and compulsory eugenic sterilization[30] that:

> Any statute or administrative order authorizing or compelling involuntary medical or surgical treatment has the possibility of being scrutinized and countermanded by the Supreme Court of the United States. . . In deciding such issues the Supreme Court has no other primary guide than the provision of the Fourteenth Amendment to the Federal Constitution that "No State . . . shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As a guide to judgment, this is no guide at all. Nevertheless the Supreme Court has for years, in the name of these provisions, condemned legislation that a majority of its members deemed to be sufficiently arbitrary and unreasonable. The exercise of this power has not been confined to procedures by which governmental action is taken, but has extended to the substance of the commands and prohibitions.[31]

Accordingly, it is submitted that if the issue should arise of whether or not there is a right to treatment, there has been "compelling evidence of the kind relevant to judgment on social institutions"[32] presented in a prior section of this paper, *The Need for the Right To Treatment*, to warrant the decision that our present policy of indefinitely involuntarily institutionalizing our mentally ill in mental prisons rather than in mental hospitals is not due process of law because it is not "fair and just and proper".[33]

IV. *Terminology*

The reader may have been disturbed by the use of the terms "inmate" instead of "patient", "institutionalization" or "imprisonment" instead of "hospitalization" and "mental institution" or "mental prison" instead of "mental hospital". There is an undoubted therapeutic value in mentally ill persons being told that they are patients who are being hospitalized in a mental hospital for care and treatment. Their families want to feel that their relatives are in a mental hospital. The community feels satisfied that its mentally ill are hospitalized.[34] The morale and efficiency of the medical staff and other personnel are kept up by the feeling that they are working in a hospital.

There is a limit, however, to the benefits of this terminology. If it allows the state to imprison the mentally ill rather than to treat them, the terminology should be analyzed in the interests of these sick people. For as long as one thinks about patients, doctors, mental hospitals and hospitalization, one can easily be deluded into misinterpreting reality.[35]

V. *Some Problems Caused By the Right to Treatment*

Some of the many problems that will arise in connection with the recognition and enforcement of the right to treatment will now be briefly discussed.

A. The courts may have to allow a reasonable interim period between the recognition of the right and the enforcement of the right. This is not an innovation in the law. A similar method is being used by our courts in connection with the enforcement of racial integration in our public school system.[36]

B. The courts may be burdened with increased litigation due to a large number of warranted and unwarranted lawsuits. If the problem became serious, additional judicial personnel could be obtained or an administrative agency could be established.

C. The courts will have to establish a reasonable standard for adequate medical care in our public mental institutions. The standards of the American Psychiatric Association[37] need not be definitive; however, they undoubtedly will be useful guides.

D. The public mental institutions may be unable to obtain sufficient numbers of competent personnel even if appropriations are increased. If this were actually the case, standards might be adjusted accordingly; however, this would be unlikely if government salaries competed realistically with the income of personnel in private practice. Furthermore, it should be realized that there is no need for all the new personnel to be the psychiatrists, psychiatric nurses and other personnel that our psychiatric training institutions now produce in limited numbers and of whom there probably is a shortage. The reason is that most of the inmates of our public mental institutions are schizophrenics and other psychotics who have been institutionalized for a number of years, mental defectives who often have crippling physical defects, or simply old people, abandoned by their families and by our society to spend their last years in a mental institution, who are conveniently diagnosed as suffering from senile or cerebral arteriosclerotic psychosis to hide a shameful social problem.[38] As Dr. Solomon pointed out for these people psychiatry has no definitive therapy, and the best that can be of-

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medical care as the state would probably provide proper medical care rather than be liable for damages resulting from inadequate medical care; however, this right is not generally available due to the doctrine of governmental immunity to liability in tort. Only a few jurisdictions have any significant legislation to remedy the injustices caused by this doctrine, of which the problem discussed in this article is only one instance. See Federal Tort Claims Act, 60 Stat. 842 (1946), codified in scattered sections of 28 U.S.C., and New York Court of Claims Act, §8. For an exhaustive state by state review, see Leflar and Kantrowitz, *Tort Liability of the States*, 29 N. Y. U. L. Rev. 1363 (1954); therefore, even if a few jurisdictions might have adequate legislation available to an injured inmate of a public mental institution, the problem still remains as a national problem. For most of the country does not have such remedial legislation available.

29. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

30. *Buck* v. *Bell*, 274 U. S. 200 (1927); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942).

31. Powell, *Compulsory Vaccination and Sterilization: Constitutional Aspects*, 21 N. C. L. Rev. 253, 18 Annals of Internal Medicine 637 (1943).

32. *Solesbee* v. *Balkcom*, *supra* note 26.

33. *Solesbee* v. *Balkcom*, *supra* note 26.

34. For an analysis of the thinking behind these feelings, see Cumming and Cumming, *Mental Health Education in a Canadian Community*, in Health, Education and Community 60-64 (Paul ed. 1955).

35. Goffman, *Characteristics of Total Institutions*, in Symposium on Preventive and Social Psychiatry, Walter Reed Army Institute of Research, Washington, D. C., April 15-17, 1957, at 43 (1958) is a comparative theoretical study of many aspects of the social structure of penal and public mental institutions. In a step by step analysis, Goffman shows the extensive similarities that exist today in the custodial, rather than therapeutic, treatment of patients in public mental institutions and of prisoners in penal institutions.

36. *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (1955).

37. American Psychiatric Association, Standards for Hospitals and Clinics (1956 ed., rev. 1958) sets minimum standards for staff-patient ratios and for physical facilities. It is submitted that these standards are not unreasonable. Under these minimum standards, the physician-patient ratio is as follows for public mental hospitals: For admission and intensive treatment services, 1 physician to 30 patients; for continued treatment services, 1 physician to 150 patients; for medical and surgical services, 1 physician to 50 patients; and, for tuberculosis services, 1 physician to 50 patients.

38. Mental Illness, a study prepared for the Committee on Interstate and Foreign Commerce of the House of Representatives, October 8, 1953, by the National Institute of Mental Health, National Institutes of Health, Public Health Service, United States Department of Health, Education and Welfare. Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on the Causes, Control and Remedies of the Principal Diseases of Mankind, 83d Cong., 1st Sess. 1080, 1086 (1953). Also, Patients in Mental Institutions 1955 (1958).

fered is social and vocational rehabilitation in a therapeutic environment.[39] Psychiatry is only one of the medical skills needed by these people; therefore, the training common to all physicians and nurses that enables them to handle routine medical problems would probably be adequate for most of these persons if more highly trained personnel are not available.

E. The states may be unable to afford the added expense of providing proper medical care.[40] As this situation will undoubtedly arise, it must be anticipated that federal aid will have to be obtained to help solve this problem. Even if one dislikes further federal intervention in the traditional areas of state control or in the practice of medicine, can the existing situation continue to be tolerated as the alternative? Furthermore, it should always be realized that the issue is not government medicine versus private medicine. The issue is simply adequate medical care under government auspices versus inadequate medical care under government auspices.

VI. *Conclusion*

This article has as its theme the concept that the present inadequate care and treatment of the institutionalized mentally ill, and the probability of its continuance in the future reflects a basic philosophical problem that in turn poses a legal, rather than a medical, problem. Accordingly, this situation calls for a legal solution; therefore, data have been presented on this inadequate care and treatment in an attempt to provoke a fundamental reevaluation of the present law affecting the institutionalized mentally ill so as to cause the recognition and enforcement of the right to treatment. It is believed that this step will help to raise the standard of care in our public mental institutions.

39. Solomon, *supra* note 2, at 8.
40. For a detailed analysis of the economics of mental illness, see Fein, *op. cit. supra* note 19.

Our Freedom Based on Law—

Is Liberty Possible Without Law?

Mr. Boehm discusses the paradox that, while people seem instinctively to feel a need for law, they frequently hold low opinions of the lawyers who make the law workable. He goes on to cite examples of great lawyers who dared to take unpopular causes, noting that the real enemy of law is not anarchy, but tyranny. The article was originally written as a radio talk delivered last summer over Station WHEC.

by David O. Boehm • ***of the New York Bar (Rochester)***

IN A WAY any talk upon the subject "Our Freedom Based Upon Law" seems, at first glance, somewhat paradoxical. For although much has been said in the past and will be said in the future about law being the safeguard of liberty, nevertheless down through recorded time much has also been said about law and lawyers in a much more disparaging fashion.

For example, as far back as 1621, Burton, in his *Anatomy of Melancholy* quoted the proverb, "He that goes to law holds a wolf by the ear." And the title of Arbuthnot's political pamphlet in 1712 is "The Law Is a Bottomless Pit". Shakespeare was even more direct. One of the characters in his plays urges with great force "Let's kill all the lawyers".

And yet the satirical comment, the jokes and gibes that continue even today suggest that to men in society the law always has been a familiar thing, a thing which they knew had the capacity for greatness, and which was discussed not for what it could do, but what mankind wanted it to do—much as Brooklyn in the past affectionately called it's favorite ball club "Dem Bums".

Through history, the law has been so much a part of man that in early days he incorporated it in all his religious beliefs. In a savage society it became a system of taboos. The Romans made it a goddess and when Moses descended from Sinai he carried with him, as a divinely revealed thing, the Tablets of the Law. It was too well understood even to require comment that God was on the side of the just and thus the first trials in England before the Norman invasion consisted of the ordeals by fire and by water whereby a verdict was established in a supernatural way. Even today we speak about going through fire and water for something or someone.

When the Normans conquered England, there was added ordeal by battle and it was here that the idea of the advocate, or lawyer, first became manifest in the person of the champion willing to do battle for an accused. Ivanhoe battling at the lists for Rebecca is a familiar example of this early type of law court where the judgment was supposed to be resolved not in favor of strength, but of right.

To point out that this may not have always been the case does not diminish the natural urge that man felt for a system of justice that could result in justice. In other words, the belief was equivalent to the fact and though the operation of law, compared to today, may have been crude and primitive, nevertheless it was crude and primitive only because it represented the society that it was in. The instinctive need for law was there just the same.

Law Exists Because It Has To

And so law exists because it has to. As a societal thing—evolved out of the customs and traditions and experience of a society which became codified—it must develop slowly in the same way that the community about it develops. But to the individual in need of a justice which may take a new or novel form, this very slowness, this painstaking exercise of deliberation before discarding one rule for another is irksome and sometimes infuriating. And so this individual, with a strong belief in the rightness of his cause, invents another proverb about the law, or creates a new condemnation of it. Sometimes this takes the form of calling for its complete abolition—a society without law—where men will live amicably together in a natural state because men are naturally good.

So Rousseau believed—but all the ambitious experiments which he inspired proved only that when men live in anarchy they cannot live together. Whereas man may be good, all men are not good.

But anarchy is not and never has been a formidable enemy of law. It is the opposite extreme, tyranny or absolutism, with which law has bitterly and tenaciously contended through the centuries. It is a demon that says to the individual who cannot find satis-

Hal Campbell Studio

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faction in the law—"Eliminate the law's delays—remove the lawyers and their technicalities; with one stroke I can give you what you want because I am above the law."

This is a siren song that has attracted many and even democracies have yielded to it. In times of stress, the early Romans appointed dictators, the Hebrews gave up their judges for a King because of the emergency created by the Philistinian wars, and Abraham Lincoln, during the Civil War, suspended the writ of habeas corpus and permitted the trial of civilians in the various Northern states by army generals in direct violation of the Constitution.

The times required, it was felt, speedy law, and so the people gave up their own individual rights in submission to the state. In a crisis this may be necessary. We all remember the War Emergency powers Congress gave to President Roosevelt during the last war.

Immediate "Justice" May Become Injustice

But when the individual demands justice so immediately, so urgently, that he feels it to be injustice to make him wait for its proper exercise, then law's worst enemy grows strong. In the dark of night the lynch mob draws the rope around its victim's neck and strangles him without a trial. The mob is always eager for quick and speedy justice. In the People's Court of the French Revolution, Mme. LaFarge clicks her knitting needles and watches the accused nobility appear before the judges, who are also the prosecutors and the jury, and the accused are condemned almost before they can draw a breath in their own defense. Quick justice—speedy justice. The sharecropper and the aristocrat are both victims of this demonic urge that whispers "Execute them before some smart lawyer with his technicalities and tricks can save them."

It is when the individual or a group of individuals is most anxious for speed in the exercise of the law that the law must act as the checkrein. How careful was the War Crimes Tribunal to avoid even the suspicion of being a drumhead court. How slowly, and to some, how tediously it examined and analyzed the proofs and accusations. And yet, in spite of the immense care and caution with which it managed its power, there were those among it who still remained uncertain, not as to whether Goering and Himmler and the others were guilty, but as to whether the judges had the right to judge the accused and condemn them as war criminals. This was the first time that such a tribunal had ever sat, the first time men were being tried for crimes of war against nations and people. But this was not a Star Chamber where confessions were extorted out of the accused, nor where a mob in a turbulent courtroom clamored for brutal revenge. It was an example of law in its endless, cautious search for truth and the principles of justice. Yet, there were and are great judges and legal scholars in many nations who wondered whether even this slow and painstaking trial, with its rigid and careful adherence to all the rules of law and the protection it gave the accused, was not wrong because it was too novel, too new and, therefore, suspect.

In a sense, therefore, it is almost the duty of the law to be unpopular. As someone pointed out "All the world hates an umpire." Frequently it runs against the tide of great popular feeling and emotion. It provides sanctuary to men who are regarded as deadly enemies of the community or of the nation. It restrains and inhibits the flood waters of popular prejudice and compels them to flow into society's proper conduits. It is a shield not only against the mob, but against the tyrant.

We see it, as Ben W. Palmer points out, in "Demosthenes, defending the democracy of the ancient world against the totalitarian menace of Philip of Macedon; undefended Cicero, standing for the Republic and leveling the shafts of his eloquence against an Anthony whose aroused assassins menaced him at the doors of the senate house; Papinian, facing certain death for refusing the Emperor's demand that he give a legal opinion justifying the Emperor's assassination of his own brother; Malherbes, during the French Revolution, going to the guillotine because he dared to defend his king; John Adams, in the face of public clamor, defending the redcoats charged with murder in the Boston massacre; William H. Seward, risking his professional and political career by acting as counsel for a poor insane negro charged with murder."

There was Erskine, almost at the risk of his life in an England fearful and apprehensive of invasion by Napoleon, defending Tom Paine of the crime of sedition for having written a pamphlet which spoke favorably of French republicanism; not only defending Paine, but obtaining his acquittal. And perhaps the greatest of them all, Edward Coke. When King James angrily said that it was treason to affirm that the king was under the law, Lord Coke, defying imprisonment in the Tower of London and the headman's axe, declared that though the King ought not to be under any man, he was under God and the Law.

This does not imply that the interpreters of the law—the judges who make the decisions and establish the guideposts—are above it. They too are men and capable of error and no one is more aware of this than the judges themselves. As the late Justice Jackson pointed out, the Supreme Court is not final because it is infallible; it is infallible only because it is final.

I have tried to show here by example rather than mere declaration that law does protect and guard our liberties—that without law, there is no freedom. And because by conferring a right upon one man, it may deprive another of his, it must be slow, it must be deliberate as well as considerate. Nor does this mean that the law is rigid or inflexible; but when it changes, when it adjusts, it is to develop with the developing society about it.

As Viscount Bryce said in his book *The American Commonwealth*—everything that has power to win obedience and reverence must have its roots deep in the past. The more slowly institutions have grown, so much the more enduring are they likely to prove.

The law therefore is the slowly reasoned will of the people, rather than the mere momentary wilfulness of the King, or even of the majority. As an example, the Eighteenth Amendment has come and gone in our time, but the first Ten Amendments are still with us and will be with us so long as our democratic form of government exists.

Is it possible to have liberty without law? This can be answered with the words of Charles Evans Hughes: "Liberty and Law are one and inseparable."

Chief Justice Appoints Advisory Committees on Federal Rules

THE CHIEF JUSTICE of the United States has announced the appointment of six nationally organized committees of judges, lawyers and legal scholars whose job it will be to study and to recommend to the Supreme Court improvement in the rules of practice and procedure in the federal courts.

The committees were appointed pursuant to an act passed by Congress (P.L. 85-513, 72 Stat. 356) July 11, 1958, authorizing the Judicial Conference of the United States, of which the Chief Justice is Chairman, to make a continuous study of the Federal Rules.

"The rules of court", Chief Justice Earl Warren said, "are the most important tools of the courtroom lawyer. So long as we have the inevitable changes in our social, economic and political lives, the demand for amendments in the rules, and also for new rules, by which we resolve conflicts in the courts is equally inevitable.

"It is essential that our rules of court be up-to-date and all amendments should be studied and recommended by committees with as broad an outlook and base as possible. Accordingly these committees include representatives of the Bar, the judiciary and the legal scholars and for their ideas they will draw upon the Bench and Bar of the country as a whole and particularly the Judicial Conferences in all eleven of the federal circuits.

"Experience has shown that in order to promote simplicity in procedure, the just determination of litigation and the elimination of unjustifiable expense and delay, it is essential that the operation and effect of the Federal Rules of Practice and Procedure should be the subject of continuous study. Such study is the objective of the committees being announced today, and every judge, practicing lawyer and legal scholar will be afforded the opportunity to participate—to state his views—with assurances that those views will be given consideration."

The Committees, and the Committee Chairmen, are:

Standing Committee on Rules of Practice and Procedure, Albert B. Maris, Senior Circuit Judge, Court of Appeals, Third Circuit;

Advisory Committee on Civil Rules, Dean Acheson, former Secretary of State;

Advisory Committee on Criminal Rules, John C. Pickett, Judge, Court of Appeals, Tenth Circuit;

Advisory Committee on Admiralty Rules, Walter L. Pope, Judge, Court of Appeals, Ninth Circuit;

Advisory Committee on General Orders in Bankruptcy, Phillip Forman, Judge, Court of Appeals, Third Circuit;

Advisory Committee on Appellate Rules, E. Barrett Prettyman, Chief Judge, Court of Appeals, District of Columbia Circuit.

The Advisory Committees will conduct the basic studies and develop reports and recommendations in the respective fields. These will be forwarded to the standing Committee on Rules of Practice and Procedure which, in turn, will report to the Judicial Conference of the United States. If approved, the Judicial Conference will formally forward the report and recommendations to the Supreme Court of the United States. The Supreme Court will approve, modify, or disapprove of the changes in the Federal Rules, and those adopted will be transmitted by the Supreme Court to the Congress. In such cases, the rules automatically become law in ninety days unless the Congress acts adversely.

Membership on the Committees are for two- and four-year terms, with each member entitled to one additional term. This will have the effect of bringing new ideas to the Committees and keeping pace with developments in the law.

The Headquarters Secretariat for the rules study will be in the Administrative Office of the United States Courts, Supreme Court Building, Washington, D. C., under the direction of Warren Olney III, Director. Aubrey Gasque, Assistant Director of the Administrative Office, will serve as Executive Secretary for the Rules Committees.

"Marlowe's Mighty Line": Was Marlowe Murdered at Twenty-nine?

In this issue, we round out our series of articles on the identity of the author of the Shakespearean plays. Since the first piece appeared in the February, 1959, issue, we have published articles setting forth the claims of the Earl of Oxford and Sir Francis Bacon, as well as the orthodox Stratfordian view. Mr. Wham's article espouses the cause of Christopher Marlowe as the author of the works. "Marlowe's Mighty Line" is taken from Ben Jonson's Panegyric, First Folio of 1623.

by Benjamin Wham • *of the Illinois Bar (Chicago)*

THOSE WHO HAVE sought to solve the Shakespearean Who-Dunit have excelled in demonstrating that Shakespeare was not the author of Shakespeare's works. But there is a serious omission in the evidence which they give in seeking a solution to the identity of the author.

Since there is admittedly a lack of facts as to the person of the author, would it not be better to consider the poetry of Shakespeare and to compare it with that of other poets of the same generation?

If we find, for example, that the author time after time plagiarizes whole lines and verses from a contemporary poet who was "murdered" at 29 (Christopher Marlowe), do we believe the world's greatest poet would stoop to such tactics, or do we think of a solution, which adds to the mystery, and conclude that perhaps Marlowe was not murdered at 29, but lived anonymously abroad and on his patron's estate and so was able to continue to write his great poetry?

In Marlowe we find a person who was born in the same year as Shakespeare, 1564, who qualifies in all ways as the author: although his father was a shoemaker at Canterbury, his early brilliance caused him to obtain a scholarship to Kings School, attached to the Cathedral, where he met the scions of illustrious families: Lyly, Sidney, Dobson, Bentham. He received a scholarship to Cambridge where he remained for seven years, translating both Ovid and Lucan, and writing, at age 22, his epoch-making *Tamburlaine*. His associates were literary figures and noblemen.

He graduated to a position of worldly brilliance. He associated with Thomas Walsingham, a cousin of Sir Francis Walsingham, and the most famous writers of the day; he shared a room with Kyd, and engaged in long discussions with Sir Walter Raleigh and others.

Tamburlaine went through seven editions and set a trend (blank verse among other things). It was followed by the even more popular *Dr. Faustus*, then by *The Jew of Malta, Edward II, Dido, Queen of Carthage*, and others.

The story, originated by Calvin Hoffman,[1] is, briefly, that Marlowe at age 29 (1593) was charged with atheism. His former roommate, Kyd, had been tortured on the rack, and his friend, Francis Kett, had been burned at the stake for no greater charges. Marlowe's position was desperate. A fateful rendezvous was arranged at the house of Dame Bull in Deptford in the company of those in the pay of Sir Thomas Walsingham, Marlowe's great friend and patron. The public was given to understand that Marlowe was murdered; whereas, the story is that a sailor had been brought into the room and in a scuffle was murdered and buried there as Marlowe, while Marlowe escaped to the Continent, where he spent some time in hiding and then returned to an anonymous existence on Walsingham's estate, there to continue to write the great poetry which he began at age 22.

So far as the records show, Shakespeare, at age 29 had written very little, but immediately he began to write the greatest poetry of all times. According to the above story, he was an actor who was employed by Walsingham to permit his name to be used as an author; and a scrivener was employed to write the final copies of the plays before they were given to Shakespeare. Of course there would be "scarcely a blot" on them. Walsingham bequeathed a sum of money to a scrivener.

The above is not tendered as evidence but only as background for the following which we submit as evidence.

The following examples of "borrowings" are submitted in Table I which we believe show that the writer of Shakespeare's works was either the world's greatest plagiarist or was Marlowe. There are many more.

1. THE MURDER OF THE MAN WHO WAS SHAKESPEARE (1955).
Note: The factual material herein is largely taken from the above book and from an analysis of it by Robert L. Heilbroner.

Table I

Marlowe	Shakespeare
The Passionate Shepherd By shallow rivers to whose falls Melodious birds sing madrigals. And I will make thee beds of roses, And a thousand fragrant posies.	*Merry Wives of Windsor* (Act 3, Scene 1) To shallow rivers, to whose falls Melodious birds sing madrigals: There will we make our beds of roses And a thousand fragrant posies.
Doctor Faustus Was this the face that launch'd a thousand ships . . .	*Troilus and Cressida* . . . she is a pearl, Whose price hath launch'd above a thousand ships
Translation of Ovid's *Amores* (first published in 1599) (Marlowe was "murdered" in 1593) The moon sleeps with Endymion every day . . .	*Merchant of Venice* (registered 1598) . . . the moon sleeps with Endymion . . .
Tamburlaine Holla, ye pampered jades of Asia What, can ye draw but twenty miles a day?	*Henry IV* And hollow pampered jades of Asia Which cannot go but thirty miles a day.
Jew of Malta I . . . hold there is no sin but ignorance.	*Twelfth Night* I say there is no darkness but ignorance.
Hero and Leander . . . leapt into the water for a kiss of his own shadow.	*Venus and Adonis* Died to kiss his shadow in the brook.
Jew of Malta These arms of mine shall be thy sepulchure . . .	*Henry VI* These arms of mine shall be thy winding sheet; My heart, sweet boy, shall be thy sepulchure.
Jew of Malta Infinite riches in a little room.	*As You Like It* A great reckoning in a little room.
Doctor Faustus Oh soul! be changed into small water-drops.	*Richard II* To melt myself away in water drops.
Dido, Queen of Carthage Disdaining, whiskt his sword about and with the wind thereof the king fell down.	*Hamlet* But with the whiff and wind of his fell sword The unnerved father falls.
Jew of Malta What? Bring you Scripture to confirm your wrongs?	*Merchant of Venice* The devil can cite Scripture for his purpose.
Jew of Malta O, my girl, my fortune, my felicity; O girl, O gold, O beauty, O my bliss!	*Merchant of Venice* My daughter! O my ducats! O my daughter!
Tamburlaine That flies with fury swifter than our thoughts.	*Hamlet* With wings as swift as meditation or the thoughts of love.
Jew of Malta But stay! What star shines yonder in the East . . . The lodestar of my life, if Abigail.	*Romeo and Juliet* But, soft! What light through yonder window breaks? It is the east, and Juliet is the sun.

But conservative Shakespearean scholars are also given pause by similar parallelisms in Shakespeare's writings. A few of these are shown in Table II (page 512). There are many others.

Views of Shakespearean Scholars

As pointed out by Mr. Bentley in his first article, in 1900 Dr. T. C. Mendenhall made an analysis of the works of Shakespeare, Bacon, Marlowe and others, based on the use of words of different lengths, the number of times used and the like. Some 400,000 words of Shakespeare were compared with a similar number of other writers. Mendenhall was employed by a Baconian backer, but the results were disastrous for the financial backer. Bacon was shown to have used consistently longer words and the two graphs were unlike. That was true of all other writers, with the exception of Marlowe. It was found that "Christopher Marlowe agrees with Shakespeare about as well as Shakespeare agrees with himself".

In addition, a number of students of Shakespeare have made statements concerning the part which Christopher Marlowe must have played in the writings of Shakespeare's works, although they were under the impression that Marlowe had been "murdered" at the age of 29:

Edward Phillips: "Christopher Marlowe, a kind of second Shakespeare."

Edmund Malone: "Christopher Marlowe was the most popular and admired dramatic poet of that age previous to the appearance of Shakespeare."

A. W. Verity: "Marlowe created the noblest vehicle of dramatic expression of which any language is capable. He created a new dramatic form."

Sir Sidney Lee: "Marlowe alone . . . can be credited with exerting . . . a really substantial influence on Shakespeare."

Robert M. Theobald: "Marlowe's tones are to be heard in even the most advanced of Shakespeare's plays. . ."

There are a number of other similar statements.

J. M. Robertson, a Shakespearean scholar, was shocked at the thought that Shakespeare could be reduced to the level of an imitator of Marlowe.

Table I (Continued)

Tamburlaine
Nature doth strive with Fortune . . .
To make him famous.

Hero and Leander
Beauty alone is lost, too warily kept.

Edward II
Sits wringing of her hands, and beats her breast.

Edward II
Or, whilst one is asleep, to take a quill
And blow a little powder in his ears,
Or open his mouth and pour quicksilver down.

Edward II
Inhuman creatures!—nursed with Tiger's milk.

Tamburlaine
The sun, unable to sustain the sight
Shall hide his head.

Hero and Leander
And half the world upon breathed darkness forth.

Tamburlaine
When Phoebus, leaping from the hemisphere,
Descendeth downward to the Antipodes.

Tamburlaine
Now are those spheres where Cupid used to sit,
Wounding the world with wonder.

King John
Nature and Fortune joined to make thee great.

Venus and Adonis
Thy unused beauty must be tombed with thee.

Richard III
Why do you wring your hands, and beat your breast?

Hamlet
Sleeping within mine orchard
My custom always in the afternoon,
Upon my secure hour thy uncle stole
With juice of cursed Lebanon in a vial
And in the pouches of mine ears did pour
The leprous distillment . . .
That, swift as quicksilver . . .

Henry VI
Oh Tiger's heart, wrapped in a woman's hide.

Romeo and Juliet
The sun for sorrow will not show his head.

Macbeth
Now o'er the one half world nature seems dead.

Richard II
. . . when the searching eye of heaven is hid
Behind the globe that lights the lower world . . .
Whilst we were wandering with the Antipodes.

Hamlet
. . . whose praise of sorrow
Conjures the wandering stars, and makes them stand
Like wonder-wounded hearers.

Benjamin Wham has practiced law in Chicago since 1920. A graduate of the University of Illinois, he served as an Infantryman during World War I and was a member of the Alien Hearing Board in World War II. He is a member of the Board of Governors of the American Bar Association and has been the Illinois State Delegate to the House of Delegates since 1951.

When he compared Shakespeare's *Richard II* with Marlowe's *Edward II* he was stunned by their similarities.

John Bakeless, whose attitude is that of a self-confessed Shakespearean conservative, concluded that "the influence of Marlowe appears to be important in nine plays of Shakespeare," naming them. He further stated that "there are faint traces of Marlowe" in the following plays and poems credited to Shakespeare, naming eleven plays, the sonnets and two long poems.

Bakeless commented "The exact relationship of these two major figures is the chiefest puzzle of literary history."

J. M. Robertson also stated that Christopher Marlowe on the basis of verse tests must have had a hand in fourteen First Folio plays, naming them.

Titus Andronicus, according to Edmund Malone, was "Written by Christopher Marlowe."

James Boswell said of it "Much more in the style of Marlowe."

Similar statements were made by A. W. Verity, William Hazlitt and several other authorities.

In *Richard III*, according to S. S. Ashbaugh, "There is far more of Marlowe than of Shakespeare." Similar statements are made by Sir Sidney Lee, A. W. Verity and others.

Julius Caesar is attributed to Christopher Marlowe in whole or in part by J. M. Robertson and a number of others.

Similar statements have been made concerning *Richard II*, *Henry VI* and several other plays by a number of leading Shakespearean scholars.

This shows the illogic of Shakespearean conservatives, since they know it was impossible for Marlowe to write any part of these plays if he died in 1593.

Mention should be made of a study of Shakespeare's imagery by Caroline Spurgeon. Miss Spurgeon classified hundreds of Shakespeare's images . . . nature, clothes, etc., and concluded that his imagery was significantly different from Marlowe's. However Miss Spurgeon's thesis reveals that Shakespeare himself was not a consistent imagist—compare *King John* and *Twelfth Night*. Nor was Marlowe, as Marion Bodwell

Table II

Titus Andronicus I'll dive into the burning lake below; . . . . . . I am a mile beyond the moon.	*Hamlet* But I will delve one yard below their mines And blow them at the moon.
Titus Andronicus He doth me wrong to feed me with delays.	*Richard II* He doth me double wrong that wounds me with flatteries.
Romeo and Juliet He came with flowers to strew his lady's grave.	*Hamlet* I thought thy bride-bed to have decked, sweet maid And not to have strewed thy grave.
The Merchant of Venice I hold the world but a world, A stage where every man must play his part And mine a sad one.	*As You Like It* All the world's a stage and All the men and women merely players.
Titus Andronicus 'Twill vex thy soul.	*King Lear* Vex not his soul.
Hamlet This quarry cries havoc!	*Julius Caesar* . . . with a remorseless voice Cries havoc.

Smith pointed out in a similar study of his imagery. Nor would we expect Marlowe, "dead" at 29, to mirror "Shakespeare" in his forties. That the selection and interpretation of imagery is at best a highly subjective study can be seen from the portrait of Shakespeare "deduced" by Miss Spurgeon from her studies of his images:

> He is indeed himself in many ways in character what one can only describe as Christlike; that is, gentle, kindly, honest, brave, and true . . .[2]

Thus conveniently forgetting about Shakespeare's bloody fantasies, his homosexual allusions, his incest motif.

Sonnets Confirm Marlowe's Authorship

The Sonnets tell an astonishingly confirmatory story of Marlowe's secret life: one of crime, guilt, exile, fraud and despair. The tale begins at Sonnet 25 where the poet laments his fate. In Sonnet 26 he says he dare not show his head; and in Sonnet 27 that he must abide far away; and in Sonnet 28 that he is "debarr'd the benefit of rest"; in Sonnet 29 he beweeps his "outcast state"; in Sonnet 36 he cries to his patron:

> I may not evermore acknowledge thee
> Lest my bewailed guilt should do thee shame.
> Nor thou with public kindness honour me,
> Unless thou take that honour from thy name . . .

In Sonnet 44 he speaks of "injurious distance"; in Sonnet 45 of "swift messengers" who bring him tidings from abroad (story is that Marlowe was abroad in Italy and elsewhere many times before and after his supposed death); in Sonnet 48,

> How careful was I, when I took my way,
> Each trifle under truest bars to thrust,
> That to my use it might unused stay
> From hands of falsehood, in sure wards of trust!

In Sonnet 71 he adjures his patron not to mourn him "Lest the wise world should look into your moan and mock you with me after I am gone." In Sonnet 72 he asks that his name be buried with his body; and two sonnets later come these startling lines:

> My spirit is thine, the better part of me;
> So then thou hast but lost the dregs of life
> The prey of worms, my body being dead,
> The coward conquest of a *wretch's knife*. [Italics added.]

And, in Sonnet 76 he speaks of the disguise through which "every word doth almost tell my name".

Is this not made clear in the following lines from Sonnet 134:

> So, now I have confess'd that he is thine,
> And I myself am mortgaged to thy will,
> Myself I'll forfeit . . .
>
> He learned but surety-like to write for me
> Under that bond that him as fast doth bind.

(A clear reference to Shakespeare.)

Four of Shakespeare's plays were registered at the stationer's office in 1600, with the caveat, "a booke to be staid". One of the plays was *As You Like It*. It was not published until 1623. One of the obvious reasons was that Shakespeare quoted directly the lines of Marlowe's *Hero and Leander*:

> Dead shepherd, now I find thy saw of might:
> "Whoever loved that loved not at first sight?"

Then too, in the play is the only character named just "William" in the 1000 characters Shakespeare invented. William is a fool and a simpleton, and he is taunted for his ignorance and his small-town upbringing by Touchstone, who, as his name implies, reveals the true worth of those with whom he comes into contact. Touchstone says to poor William,

> For all your writers do consent that ipse is he:
> now you are not ipse, for I am he.

But Touchstone says something even

2. Shakespeare's Imagery at page 207.

more provocative. Talking to Audrey, a country maid, he says:

> When a man's verses cannot be understood, nor a man's good wit seconded with the forward child? Understanding, it strikes a man more dead than a great reckoning in a little room.

"Great reckoning in a little room"!—what could be a more direct allusion to Marlowe's death? And how could William Shakespeare have known the facts of Marlowe's death when no one knew them at that time?

Note the parallel treatment of Marlowe's *The Jew of Malta.* It was registered with the stationer's company on May 17, 1594. The earliest published version however is the Quarto of 1633. Why was the play first published almost forty years after it had been registered?

Perhaps it is significant that the character who speaks the Prologue—Machevil—recites some three dozen lines which are a remarkable confirmation of the myth of Marlowe's 1593 "murder".

Was the Prologue written after 1593? Professor C. F. Tucker Brooke thought it may be possible.

Here are some of the lines of the prologue—

> Albeit the world think Machevil is dead,
> Yet was his soul but flown beyond the Alps,
> And now the Guise is dead, is come from France
> To view this land and frolic with his friends.
> To some, perhaps my name is odius,
> But such as love me guard me from their tongues,
> And let them know that I am Machevil,
> And weigh not men, and therefore not men's words . . .

Perhaps Machevil should be read as Marlowe and the Guise as a high governing British official who prevented Marlowe from returning to England. If so, then here is a pretty clear statement of what happened. This would explain the delay in publication.

There are many other important bits of "evidence" which could be cited but let us close this already too long statement by referring to the incident in the summer of 1953 in which a student walking through the old court of Corpus Christi College noticed a bit of painted wood sticking out of a pile of rubble. The rubble came from the plaster in the master's room which was in its first process of renovation since having been plastered up after Marlowe's residence at Corpus Christi. The painted panel was a portrait. The portrait was of a rather sad-faced, sensitive romantic young man. In the upper right hand corner it read in Latin "Age 21", and the date 1585. Beneath it a Latin couplet read *Quod me nutrit, me destruit* ("That which nourishes me destroys me").

Who could it be? Marlowe was in Cambridge in 1585 and was 21 that year. Furthermore, he was several years older than most of the students, and there were only a dozen in his class. And the quotation? It reappears as *Quod me alit, me extinguit* ("That which lights me extinguishes me") in Shakespeare's *Pericles,* and in English in Sonnet 73: "Consumed with that which it was nourish'd by."

More amazing still this portrait has been identified as the youthful counterpart of the Droeshout engraving in the Shakespeare First Folio.

The solution that Marlowe lived and wrote the works of Shakespeare answers many questions. It may answer Marchette Shute's question concerning Shakespeare's ability to write comedies at the time his only son had died. It may explain Shakespeare's retirement at 46. That, of course, was old in those days, but perhaps Marlowe died or burned out at that time.

More persuasive is the need, as I understand, for the writer of great tragedies to have experienced great tragedy in his personal life. Marlowe fulfills this requirement above all others if we credit this theory. Here was a man of surpassing genius, rich with words and overflowing with creative fervor writing the finest plays of all time, yet doomed to perpetual anonymity and exile. He walked forbidden coasts in silence and fear, suspicious of every glance; he ran forever like a thief in the night; he tossed and fretted in uneasy slumber, tormented by horrible dreams, while seeing another credited with the authorship of his plays.

Does it not explain the many parallelisms, even plagiarisms of Marlowe's lines? Had Shakespeare the genius required to write these plays and works would he have stooped to such practices?

Perhaps it explains the statement concerning mercy and justice in the *Merchant of Venice*:

> The quality of mercy is not strained . . .

and ending with an appeal that justice be tempered by mercy.

Perhaps it explains the utter despair and frustration of an author who could write:

> To-morrow, and to-morrow and to-morrow
> Creeps in this petty pace from day to day . . .

Or:

> To be or not to be; that is the question.
> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune
> Or to take arms against a sea of troubles,
> and by opposing end them . . .

And note in this soliloquy the line:

> The undiscovered country from whose bourne no traveler returns . . .

and compare Marlowe's *Edward II:*

> Weep not for Mortimer that
> Scorns the world, and, as a traveler,
> Goes to discover countries yet unknown . . .

The latter lines were written by Marlowe in his twenties. They are filled with youth and adventure and express no fear of an unknown world. The first lines from *Hamlet* were written by an author when he was perhaps fifteen years older. Here the emphasis was on the fear of an unknown country from which there is no return. Throughout the soliloquy there is conflict between a desire to end it all and fear of the hereafter, with emphasis on the terrible dreams that may occur in the sleep of death. Is it not reasonable to assume that this conflict was caused by the author's intervening tragic anonymous existence and accompanying tormenting dreams?

Nominating Petitions

Arizona

The undersigned hereby nominate James M. Murphy, of Tucson, for the office of State Delegate for and from Arizona to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Gerald Jones, W. E. Dolph, Jr., T. K. Shoenhair, Frank H. Watkins, Richard Briney, William A. Scanland, William C. Frey, James A. Walsh, Harold C. Warnock, Richard M. Bilby, William H. McBratney, David G. Watkins, John C. Gung'l, E. T. Cusick, Vincent E. Odgers, Eugene J. Lane, Richard G. Darrow, M. V. Morales, Jr., Burt Haberman, Lawrence P. D'Antonio, Evo DeConcini, Richard R. Fish, William Spaid, C. R. McFall, and Ray F. Harris, of Tucson.

Arizona

The undersigned hereby nominate C. A. Carson III, of Phoenix, for the office of State Delegate for and from Arizona to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Joseph P. Ralston, G. R. Carlock, Eli Gorodezky, Keith A. Haien, W. A. Evans, Larry Laughlin, Robert H. Allen, Louis McClennen, James P. Bartlett, Clarence J. Duncan, Orme Lewis, Francis J. Ryley, John Devens Gust, Robert W. Pickrell, Henry W. Allen, J. Early Craig, Kent A. Blake, Richard Fennemore, Charles N. Walters, Ross D. Blakley, A. M. Posner, James M. Smith, Ralph J. Lester, James M. Bush and Harold L. Divelbess, of Phoenix.

Connecticut

The undersigned hereby nominate Samuel H. Platcow, of New Haven, for the office of State Delegate for and from Connecticut to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Charles R. Covert, P. C. Calhoun, Norman K. Parsells, H. Mefford Runyon, David S. Day, Philip Hawley Smith, and Paul V. McNamara, of Bridgeport;

John T. Fitzpatrick of Fairfield;

Frank E. Dully, Edward J. Foley, Bradley B. Bates, Edwin A. Lassman, Charles H. Blackall, Joseph P. Cooney, Jerome T. Malliet, Robert E. Mansfield and Edward J. Daly, Jr., of Hartford;

Samuel A. Persky, Harold C. V. Eagan, Donald E. Cobey, Francis J. Moran, John E. McNerney, Julius Maretz, Richard H. Bowerman and James W. Cooper, of New Haven.

District of Columbia

The undersigned hereby nominate Francis W. Hill, of Washington, D. C., for the office of State Delegate for and from the District of Columbia to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Walter M. Bastian, Charles S. Rhyne, W. Dean Wagner, Edmund L. Jones, John J. Wilson, William P. Smith, John J. Carmody, Edmund D. Campbell, Richard W. Galiher, Roger Robb, John E. Powell, James M. Earnest, J. P. Wetherill, James Craig Peacock, Benjamin W. Dulany, Richard S. Doyle, David C. Bastian, Frederick A. Ballard, W. Cameron Burton, Thomas M. Raysor, Bernard I. Nordlinger, Edmund L. Browning, Jr., Wilbert McInerney, Justin L. Edgerton and George L. Norris, of Washington, D. C.

Montana

The undersigned hereby nominate Emmett C. Angland, of Great Falls, for the office of State Delegate for and from Montana to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Robert D. Corette, of Butte;

George Robert Crotty, Jr., John P. Wuerthner, George N. McCabe, William L. Baillie, John H. Weaver, Edw. C. Alexander, John H. Kuenning, Richard B. Conklin, Gene B. Daly, Truman G. Bradford, Paul G. Hatfield, Ralph T. Randono, Joseph R. Marra and Robert W. Conley, of Great Falls;

Gene A. Picotte and John W. Bonner, of Helena;

William T. Boone, William Evan Jones, J. C. Garlington, Edward T. Dussault, Harold J. Pinsoneault, David R. Mason, Robert E. Sullivan and Robert T. Pantzer, of Missoula.

Oklahoma

The undersigned hereby nominate H. T. Tumilty, of Oklahoma City, for the office of State Delegate for and from Oklahoma to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Stephen A. George, Earl Rader, Andrew B. Riddle, Jr., Andrew B. Riddle, Sr., Louis A. Fischl, T. G. Johnson, James W. Williams, Joseph M. Culp, William G. Davisson, R. Rhys Evans, Harold Springer, Geo. N. Otey, John M. Poindexter, Kenneth Shilling and Earl Q. Gray, of Ardmore;

Paul G. Darrough, Jr., W. H. Brown, Fred E. Suits, Mary L. Weiss, Paul Dudley, T. W. Garrett, John K. Speck, Arnold T. Fleig, Bettie D. Brooks, and J. B. McClelland, Jr., of Oklahoma City.

Oklahoma

The undersigned hereby nominate Baker H. Melone, of Oklahoma City, for the office of State Delegate for and from Oklahoma to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Gus Rinehart, David J. Morrison, Paul C. Duncan, Fred M. Mock, Wayne L. Turpin, Calvin W. Hendrickson, George F. Short II, John R. Couch, James S. Steph, John F. Butler, Mark

G. Meister, Merton M. Bulla, J. M. Sheehan, Kenneth J. Wilson, Don Emery, W. Otis Ridings, Norman E. Reynolds, Jr., Fred C. Fields, Granville Tomerlin, Jack High, Russell V. Johnson, John Chiaf, O. A. Cargill, Albert J. Hoch, and O. A. Cargill, Jr., of Oklahoma City.

South Carolina

The undersigned hereby nominate Walton J. McLeod, Jr., of Walterboro, for the office of State Delegate for and from South Carolina, to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

R. M. Jefferies, Jr., Edgar A. Brown and Herman I. Mazursky, of Barnwell;

Frank H. Bailey, Irving Steinberg, Charles H. Gibbs, Robert A. Patterson, Samuel J. Corbin, Edward D. Buckley and J. W. Cabaniss, of Charleston;

Wesley M. Walker, J. D. Todd, Jr., Fletcher C. Mann and James H. Watson, of Greenville;

J. Davis Kerr, Roy McBee Smith, Frank A. Lyles, R. E. Browne III, J. D. Rowland, T. Sam Means, Jr., and William C. Lyles, of Spartanburg;

Henry B. Richardson, Perry M. Weinberg, Shepard K. Nash and John S. Wilson, of Sumter.

South Carolina

The undersigned hereby nominate Arthur D. Rich, of Aiken, for the office of State Delegate for and from South Carolina to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

Dorcey Lybrand, Marvin B. Poston, Marion L. Powell, Milly S. Dufour, Alfred E. Dufour, Robert E. Johnson, Charles E. Simons, Jr., Gasper L. Toole III, Henry Busbee, George H. Grant, Howard K. Williamson, Jr., P. F. Henderson, Julian B. Salley, Jr., Lonnie A. Garvin and Frampton W. Toole, Jr., of Aiken;

Solomon Blatt, Solomon Blatt, Jr., and Ira Fales, of Barnwell;

Daniel R. McLeod, John G. Martin, William H. Townsend and T. C. Fitzgerald, Jr., of Columbia;

T. E. Walsh, Simpson Hyatt and C. Yates Brown, of Spartanburg.

Texas

The undersigned hereby nominate Cecil E. Burney, of Corpus Christi, for the office of State Delegate for and from Texas to be elected in 1960 for a three-year term beginning at the adjournment of the 1960 Annual Meeting:

R. C. Grisham, of Abilene;

John P. Blair, of Beaumont;

C. Burtt Potter, Eugene Goldgar, E. H. Theis, Owen D. Cox, Charles L. Hale, Jr., C. B. Neel, John G. Seaman, Jack R. Blackmon, Jack E. A. White and John C. North, Jr., of Corpus Christi;

Robert G. Storey, Jr., R. M. Martin, Jr., Hugh L. Steger, Edward B. Winn and Phillip I. Palmer, of Dallas;

Richard D. Davis, of Galveston;

William C. Clark, of Lubbock;

John Ben Shepperd, of Odessa;

Carl Runge, of San Angelo;

W. Pat Camp, of San Antonio;

Richard Henderson, of Victoria;

Wilford W. Naman, of Waco;

Leslie Humphrey, of Wichita Falls.

Make Your Hotel Reservations Now!

The Eighty-Third Annual Meeting of the American Bar Association will be held in Washington, D. C., August 29-September 2, 1960.

The January, 1960, issue of the JOURNAL carries a complete announcement with respect to hotels, registration, etc., and in requesting accommodations please use the hotel reservation application therein provided.

Attention is called to the fact that many interesting and worthwhile events of the meeting will take place on Sunday, August 28, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 29.

Accommodations are now available in the following: Ambassador, Burlington, Charterhouse Motor Hotel, Diplomat Motor Hotel, Dupont Plaza, Lafayette, Manger Annapolis, Manger Hamilton, Marriott Motor Hotel, Pick-Lee House, Roosevelt, Sheraton Park (for *departure* not later than *August 31*), Shoreham (for *departure* not later than *August 31*), Washington, and Willard.

Requests for hotel reservations should be addressed to the Registration Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois, and must be accompanied by payment of the $35.00 registration fee for each member for whom reservation is requested. This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have definite dates of arrival and departure.

AMERICAN BAR ASSOCIATION

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Students in Law Schools, $3 a year.
American Law Student Association members, $1.50 a year.
Single copy price, 75 cents; to members, 50 cents.

EDITORIAL OFFICES

1155 East 60th Street.....Chicago 37, Ill.

Food for Thought

In this issue we print a report in support of a Bureau of Economics for the Legal Profession by one of the outstanding leaders of the American Bar, Reginald Heber Smith, of Boston. No one is better qualified than he to speak on this subject. His pamphlet, "Law Office Organization", has gone through several editions. He recently served our Association as the Director of the Survey of the Legal Profession. Mr. Smith believes that one of the prime reasons for the decline in lawyers' income is the lack of efficient organization among lawyers. There is much logic and much good evidence to support his conclusions.

To the extent that this is true, lawyers themselves are to blame. Modern law is not an esoteric field in which legal priests practice mysterious rites in the Temple of Justice. It is primarily a field of public service. Efficiency, therefore, should be the watchword of every law office. Successful modern business offices are equipped to furnish rapid, accurate service. It has been said that a very substantial part of a lawyer's work is merely routine service to a client. Those in business and in law who furnish the most efficient and swiftest service are leaders in their field. In Missouri recently a survey showed that so simple a thing as keeping daily time records proved this important fact: the lawyers who keep time records have a *net* income which is almost identical to the *gross* income of lawyers who do not keep time records. Here are the Missouri statistics:

Time Keepers	*State-wide*
Gross income	$22,674
Net income	15,181
Non-Time Keepers	
Gross income	15,771
Net income	10.651

The law's delay is something for which our profession is notorious historically. Unless many lawyers reorganize their thinking and improve their methods of work, it is highly likely that their incomes will continue to decline when compared with the earnings of other successful business and professional men. One vital reason outstanding business leaders are successful is that they are efficient. One reason they are efficient is that they are well organized. In our modern world specialization and group law practice have become the *sine qua non* of a successful law office. All available statistics prove that group practice and increased earnings go hand in hand.

Readers will find that Mr. Smith's proposal for a Bureau of Economics for the Legal Profession is well worth reading.

A New Right

Society is becoming more and more conscious of its duty to the victims of unfortunate circumstances. It provides the unemployed with an income. When a working man is injured in the course of his employment contributory negligence, the fellowservant rule and the defense of assumption of risk are by-passed by workman's compensation acts which are attuned to the needs of the injured man. Our interest in the victims of unfortunate circumstances has caused us to make provision for the impecunious aged.

But unfortunately, the individual who is suffering from a mental ailment still finds himself the victim of attitudes which took shape in an earlier period. For him the clock has not moved for a century or more. Some still view the victim of a mental breakdown as though a stigma had attached itself to him. Even if he recovers and is released from the mental hospital the stigma clings to him.

Virtually all people still regard a charge that an individual is insane as so baleful that they demand that the courts make provision so that anyone against whom such a charge is filed may receive a prompt, suitable hearing before a court.

But if, upon the hearing, the charge of insanity is sustained, society seems to abandon interest in the unfortunate victim of the mental disability. When he has once

entered a mental hospital inquiry is rarely made thereafter as to whether he is receiving appropriate medical and psychiatric attention. Statistics indicate that in 1955 there were some 554,000 people confined daily in public mental institutions. That vast number should be a matter of concern to all of us. If it is possible to reclaim some of them through enlightened attention the latter should, by all means, be given.

The fact that a person has a mental ailment is not a crime. Therefore, if any one is voluntarily restrained of his liberty because of a mental ailment the state owes a duty to provide for him reasonable medical attention. If medical attention reasonably well adapted to his needs is not given, the victim is not a patient but is virtually a prisoner.

There are those who find in the present treatment of the inmates of our mental hospitals a wrong which demands correction. Data can be assembled showing that the state makes woefully inadequate preparation for the inmate's treatment. Those who criticize the present state of affairs argue that involuntary confinement of the deranged in the institution necessarily gives him a right to adequate treatment. Obviously, the reason why he does not receive better medical attention is because the state appropriates for the support of its mental institutions an insufficient sum of money. Those who insist that the person incarcerated in a state mental hospital has a right to nothing less than reasonable medical attention urge that the legislature must not be permitted through budgetary legislation to be the sole arbiter of the right. In this day, when we have come to the point of deeming that the plight of the indigent aged is not one for treatment in a poorhouse, it would seem as though the sponsors of the rights of the mentally ill are worthy of our attention.

Those who advocate that the courts should recognize and enforce the rights of the mentally disabled to reasonable medical treatment point out that if the courts will do so the legislatures will be forced to appropriate larger sums for the mental hospitals. They submit statistics which show that only fifteen states have more than 50 per cent of the total number of physicians needed to staff the public mental hospitals according to standards established by the American Psychiatric Association. The registered nurses number only 19.4 per cent of those who are deemed necessary. Of course, larger appropriations would be costly, but they would be off-set in a measure by the savings effected when a greater number of patients were returned to society as cured or no longer needing institutional treatment.

A precedent which held that the patient in a public mental hospital has a right to receive reasonable medical and psychiatric attention might work wonders. It could be the dawn of a new day for thousands who upon receiving better attention would be released from the madhouse to lives of usefulness. A precedent can work wonders. Think of what *Marbury* v. *Madison* did for statecraft. Think what protection against disaster has flowed from the day when *Rylands* v. *Fletcher* was announced.

Thoughts in a Library

He had finished reading the last best seller which appealed to him. It was nearing bedtime. After the depressing story of political intrigue, he sought something bright to induce sleep on a happy note. Surrounded by his old book friends, he mused about their history. Leather-bound law books, the leather peeling from age, of the young King's Attorney whose bailiwick extended from the Blue Ridge northwest to the Great Lakes; books which had known George Washington as a young surveyor and Braddock on his last campaign; books which had heard the bells ringing when Cornwallis surrendered at Yorktown; novels which had seen the militia marching towards Washington to try to forestall its capture by the British in 1812; volumes which had witnessed the return of the troops from the Mexican War. These and other books had been in the great house of gracious living on the high road running north and south. Many of their companions had been loaned to the soldiers of the Confederacy; others had been removed for paper needed to start a fire with fence rails. One never knew from one day to the next whether the camp fires of friends or enemies would light the grounds around the old stone dwelling.

The house was lost to others during the years when the area was a military district and the land was governed by strangers. The surviving sons and daughters of its master, the furniture and the remaining books were scattered to the four winds. In time a new town house was built and some remnants of the old library were gathered together in a spacious new room. There were shelves for many volumes and bound copies of the magazines for old and young—*Harpers* and *The Youth's Companion*.

From country living to the city and then back again to the country and a smaller library with fewer shelves. Many old friends must go that the most prized could be retained to tell their stories. Where should he browse? Among the ancient volumes of law, the classics, histories that had gathered three more wars? Nine wars in five generations. He wondered if the peoples of the world must await partial annihilation before the rule of law prevails. Not a sleep-inducing thought. So he turned back to his friends and his choice came as an anticlimax. He read where the book fell open:

> "You are old," said the youth, "and your jaws are too weak
> For anything tougher than suet;
> Yet you finished the goose, with the bones and the beak—
> Pray, how did you manage to do it?"
>
> "In my youth," said his father, "I took to the law,
> And argued each case with my wife.
> And the muscular strength, which it gave to my jaw,
> Has lasted the rest of my life."

With Alice he wandered through Wonderland until he and the Dormouse were ready for bed.

International Bar Association:

To Meet in Salzburg, Austria, in July

An outstanding American Bar Association delegation, headed by President John D. Randall, and including several Past Presidents and current members of the Board of Governors and the House of Delegates, will attend the Eighth Conference of the International Bar Association at Salzburg, Austria, July 4-8, 1960.

With the assistance of Loyd Wright, a Past President of the American Bar Association and now Chairman of the International Bar Association, President Randall hopes to make the visit in Austria a memorable occasion for the American Bar Association members who will be in attendance.

The Conference will take place Monday through Friday, the week of July 4. During that period there will be receptions by the Governor and Mayor of Salzburg and by the Federal Minister of Justice. There will also be an excursion to picturesque St. Gilgen and St. Wolfgang, and an "evening at home" with the Austrian Bar Associations. The closing dinner on Friday evening, July 8, will be held in the magnificent salons of Castle Klessheim.

The following week Americans and conferees from other countries have been invited to Vienna. On Monday evening, July 11, there will be a reception for International Bar Association conferees at Grinzing on the hills outside the city; and at 6 P.M. on Tuesday, July 12, Federal Chancellor Julius Raab will receive conferees at the Austrian Chancellery.

American Bar Association members participating in the Salzburg Conference will also be Patrons of the International Bar Association. Full details concerning the Conference and patron affiliation may be obtained from the Secretary General of the International Bar Association, Gerald J. McMahon, 501 Fifth Avenue, New York 17.

The following topics are to be discussed at the Salzburg Conference: (1) "The Function of a Bar Association in Providing Services to the Profession and the Public—Continuing Education of the Profession", on which Churchill Rodgers, of New York, will write the American Bar Association paper; (2) "Professional Conduct: (a) The Client's Privilege of Secrecy in his Communications with His Attorney; and (b) The Propriety of Attorneys Using Wire-Recorders and Film Cameras for Evidence, etc.", the American Bar Association information on which has been supplied for the committee reports by John P. Bracken, of Philadelphia; (3) "Monopolies and Restrictive Trade Practices", with George Seward, of New York, serving as the American Bar Association member of the Committee; (4) "Court and Court Procedure for Protection of Investments Abroad", with Edward G. Knowles, of Denver, serving as the American Bar Association member of the Committee; (5) "Atomic Energy", and the Vice Chairman of this Committee is E. Blythe Stason, of the University of Michigan; (6) "A Draft Convention for Taking Evidence and Serving Documents Abroad", a topic which has been on the agenda for several conferences and on which Committee the American Bar Association has been ably represented by Harry LeRoy Jones and Philip W. Amram of Washington, D. C.; and (7) "The Formation and Operation of Foreign Subsidiaries and Branches, Including the Extent to Which Foreign Subsidiaries Are Entitled to Special Treatment under the Law of Their Incorporation or under International Law".

In furtherance of one of the main objectives of the International Bar Association, that of spreading good-will, peace and understanding among the profession throughout the free world, the President of the Federal Republic of Austria will give a reception for members of the Council of the International Bar Association only, on July 12, in Vienna, and the Chancellor of Austria will give a reception on Tuesday, July 12, at the hour of 6:00 P.M., at the Hofburg in Vienna, for all of the patrons and their wives and families who wish to attend. This will be held at the Austrian Chancellery. In addition thereto, the Verband Osterreichischer Banken und Bankiers will have a reception on Monday, July 11, for patrons and their families attending the conclave, to be held at one of the historic old castles outside of Vienna. Invitations will be issued separately. Hence, it is important that Americans going to the conclave should make their reservations for hotel accommodations in Vienna if they wish to participate in this affair, and notify Gerald J. McMahon, Secretary General of the International Bar Association, of their intention to attend.

A Hoax Three Centuries Old

In this article, the last of our Shakespearean series, Dr. Benezet answers William W. Clary and John N. Hauser, who argued the case for the orthodox "Stratfordian" side of the controversy over the authorship of the Shakespeare plays. Mr. Clary's and Mr. Hauser's articles appeared in the July, 1959, issue. Dr. Benezet is a partisan of the Earl of Oxford.

by Louis P. Benezet • ***of Honolulu, Hawaii***

I MUST VIGOROUSLY protest the picture of Edward de Vere, the Seventeenth Earl of Oxford, found on pages 707, 765 and 766 of the July, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL. The man who describes him as a light-headed dissolute fop who "at the end had the mentality of a failed gambler", can hardly be termed a historian.

Oxford a fop! Although he was small in stature, in his early twenties he won first prize in the two tournaments in which he took part. In one he unhorsed Sir Christopher Hatton, the Earl of Sussex, Leicester, the Comte de St. Aignon, and the Prince d'Ausine of France. In the other he won from the Earl of Stafford, Sir Henry Knollys, Sir Thomas Knyvet, and Thomas Bedingfield. When only 20 he had distinguished himself in fighting against the Scots as a staff officer under the Earl of Sussex. When the Spaniards were about to invade Alsace and the Low Countries, the great Sturmius (Johann Sturm, Rector of Strassburg University) wrote the Queen begging her to send "the Earl of Oxford, the Earl of Leicester, or Sir Philip Sydney" (in that order) to lead the army of resistance. The Queen did send Sir John Norris, with Oxford as second in command (the cavalry).

Next, the man called a dissolute fop fitted out a warship at his own expense and captained it in the three-day battle against the Spaniards. The magazine *Navy* recently proved that "Shakespeare" had taken part in that battle.

Sir Edward Creasy (*Decisive Battles*, page 240) singles out Raleigh, Oxford and Cumberland for their timely arrival to reinforce the Admiral. Hallam, Marriott and Tillyard give the credit to the group (Nashe, Greene, Churchyard, *et al.*) whom Oxford had housed in Jasper Fisher's former mansion to write the propaganda plays that won the war.

He was admitted to Cambridge University before he was nine years old, had an A.B. before he was 14, an M.A. at 16, an LL.B. before he was 19. John Farmer, the composer, in dedicating his first book of madrigals to Oxford, said, "My Lord, it is well known that you, as an amateur, hath overgone most of us professional musicians." There is a reference by Anthony Munday to two compositions by Oxford for which Munday had written words.

Sir Sidney Lee (see the *Dictionary of National Biography*) says that "a sufficient number of his poems is extant to corroborate Webbe's comment that in the early days of Queen Elizabeth he was the best of the courtier poets, and that 'in the rare devices of poetry he may challenge to himself the title of the most excellent amongst the rest.'"

There was in those days a rule at court forbidding courtiers to publish poetry over their own signatures. But this rule did not bind Oxford in his early days when high in the Queen's favor.

"For Comedy and Enterlude the Earl of Oxford and Master Edwards of her Majesty's Chapel deserve the highest praise", says the *Art of English Poesie*. But as Oxford fell in grace with Her Majesty, he too had to abide by the ruling. "In these days poets as well as poesie are become subjects of scorn and derision. Now of such among the nobility or gentry as be very well seen in the making of poetry, it is come to pass that they are loath to be known of their skill. So, many that have written commendably have suppressed it or suffered it to be published without their names. And in her majesty's time that now is are sprung up another crew of courtly writers, noblemen and gentlemen, who have written excellently well, as it would appear if their doings could be found out and made public with the rest, of which number is first that noble gentleman, Edward, Earle of Oxford." (*Ibid.* 1589)

All of the historical plays of the ante-Armada period were played (or printed) anonymously. Then, with

Venus and Adonis, appeared in April, 1593, the name "William Shakespeare". Five years later a handful of plays were stolen and printed under the same name. Meres, who included in a list of best writers of comedy both Oxford and Shake-Speare, may not have known that the two names represent the same man. Or, he may have been aware of it but unwilling to be the one to uncover the pseudonym.

Among Oxford's other literary works before his twenty-third birthday was a Latin preface of some two thousand words written at the request of his old Cambridge teacher, Bartholomew Clerke, for the latter's translation from Italian to Latin of one of the famous books of the Italian Renaissance. It was *The Courtier* by Balthasar Castiglione, second only to Machiavelli's *The Prince* in its effect on Italian thought. The book was used in universities all over Europe, and the brilliant introduction was highly praised.

At Oxford University some years later Gabriel Harvey, in an address, turned toward Oxford and said, "Let that courtly epistle, more polished even than the writings of Castiglione himself, witness how greatly thou dost excel in letters." Not bad for a dissolute fop of twenty years! But the Folger Library people would say, "If only William Shakespeare of Stratford had been asked to write this preface, then we should have seen something!"

The following year Oxford discovered that his friend Thomas Bedingfield was engaged in translating from the Italian that great philosophic work, the *Comfort* of Cardanus. Oxford read the work in both the Italian and in Bedingfield's English version, became enthusiastic about it, and insisted on paying for its publication. Bedingfield yielded on condition that Oxford should write an introduction for the book. Oxford obliged with a three-page prefatory letter, and followed it up with a six-stanza poem which sounds as if it were written by a socialist rather than a feudal lord of 21:

First Stanza:

The labouring man that tills the fertile soil
And reaps the harvest fruit, hath not indeed
The gain, but pain; but if for all his toil
He gets the straw, the lord will have the seed.

Sixth Stanza:

So he that takes the pain to pen the book
Reaps not the gifts of golden goodly muse;
But those gain that, who on the work shall look,
And from the sour the sweet by skill shall choose.

Of course this may seem immature when compared with the versifying of the true Bard of Avon at the age of 52:

Good Frend for Jesus Sake forbeare
to diGG FE Dust EncloAsed HERe
Blese be FE Mansyt spares FEs Stones
And curst be HEcyt moves my Bones.

(This is copied from George Steevens' facsimile of the original inscription, made in 1798.)

Incidentally Cardanus' *Comfort* has been called "Hamlet's book". The philosophy of the Danish prince is found throughout the work.

Oxford wrote plays to amuse the court. Gilbert Talbot wrote to his father about one, put on by five young noblemen, which was very amusing. "The script", he says, "was much better than the acting."

The death of the sixteenth Earl had left a company of actors without a sponsor. Edward, the 12-year-old son, promptly took over. There was never a time when he was not the patron of at least one troupe, and at one time he had three, simultaneously. He leased the Blackfriars Theatre. He engaged as his secretaries two literary men, Anthony Munday and John Lyly. Munday had published the *Mirror of Mutability*, dedicated to Oxford, and small books of verses. Lyly had written his two *Euphues* works, one before going to Oxford. The second volume was dedicated to his new master. Soon an unusual thing happened—both writers blossomed out as dramatists! According to the "Shakespeare authorities" of the nineteenth century, Lyly is the one playwright whose style and plots had a great influence on the Stratford man. But Lyly himself confesses how much he has learned from "my very good Lord and Master, Edward de Vere, Earl of Oxenford".

Critics have been surprised at the charming lyrics that are found sprinkled through Lyly's plays. They are as different from his prose style as black is from white. When Lyly's plays were first printed in a set these songs had been omitted. There were blanks left with "song here" or "lyric here". As they are surprisingly similar to lyrics scattered through "Shakespeare's" works, Oxfordians must believe that Lyly's "Master" obliged by filling the spaces with his own verses.

Pinch him, fairies, mutually,
Pinch him for his villainy.
Pinch him and burn him and turn him about
Till candles and starlight and moonshine be out.

Pinch him blue
And pinch him black
Let him not lack
Sharp nails to pinch him blue and red
Till sleep hath rock'd his addle head.

Pinch him, pinch him, black and blue,
Saucy mortals must not view
What the Queen of Stars is doing,
Nor pry into our fairy wooing.

This is fairy land! O spite of spites,
We talk with goblins, owls and sprites.
If we obey them not, this will ensue,
They'll suck our breath or pinch us black and blue.

Of the four stanzas, two are found in "Shakespeare" plays. The other two are lyrics inserted in the works of Lyly, but plainly written for him by someone else. Let doubters select the two that were composed by the same brain that dictated the following:

I gyve and bequeath unto All my Plate the saied Elizabeth Hall (except my brod silver & gilt bole) that I now have.

Anthony Munday, in dedicating another book (*Zelauto, the Fountain of Fame*) to Oxford, says that he has "sufficiently seen the rare virtues of your noble mind and the heroic qualities of your person". Thomas Watson dedicated his collection of poems *Hekatompathia* to Oxford in 1582. Edward Arber, the well-known Elizabethan critic, wrote in his introduction

to a modern reprint of the volume, "Whoever reads this remarkable book will wonder how it can have fallen into such oblivion. Each poem is headed with 'an annotation'. These introductions are most skilfully written. Who wrote them: May he not have been the Earl of Oxford?" Watson hints in one of the introductions (No. 67) that this is true.

Watson compiled another book of verse which was published in 1593. The last poem is a sonnet by Oxford, which is to be found on page 196 of Captain Ward's *Life of Oxford:*

Who taught thee first to sigh, alas, my heart?
Who taught thy tongue the woeful words of plaint?
Who filled thine eyes with tears of bitter smart?
Who gave thee grief and made thy joys to faint?
Who first did paint with colours pale thy face?
Who first did break thy sleeps of quiet rest?
Above the rest in Court, who gave thee grace?
Who made thee strive in honour to be best?
In constant truth to hide so firm and sure,
To scorn the world, regarding but thy friends?
With patient mind each passion to endure,
In one desire to settle to the end?
Love then thy choice, wherein such choice thou bind.
As nought but death may ever change thy mind.
Earl of Oxenforde

I read to William Lyon Phelps this sonnet, along with lines from de Vere's acknowledged poems, all sandwiched between some of the least known Shakespeare sonnets.

"What do you think of it?" I asked.

"It is beautiful."

"Where do you place it?"

"It is Elizabethan", he answered.

"Did one person write all of it?" I asked.

"Oh, unquestionably", said he. Then I told him the sources. His eyes nearly popped out.

"What does Kittredge think of this?" was his next question. (This was 1939.)

"One of the editors of the *Globe* took this to Kittredge, who slammed the door in his face", I answered.

There are remarkable tributes to Oxford, as a writer and a man, from Spenser, Chapman, Greene, Nashe, Angel Day and Churchyard.

The Harleian Manuscripts have preserved an epitaph, written by an anonymous contemporary, which has been often quoted as just and true:

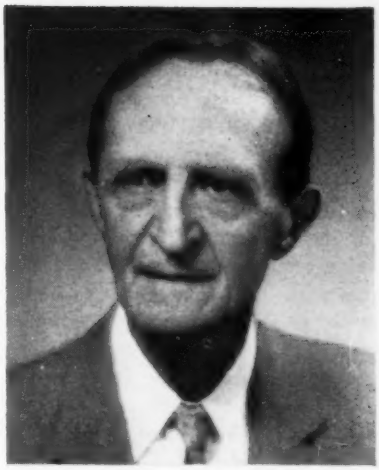
> Edward de Vere, Earl of Oxenford, High Chamberlain, Lord Bolbec, Sandford and Badlesmere, Steward of the Forest of Essex, and of the Privy Council to the King's Majesty that now is, of whom I will only speak what all men's voices confirm: he was a man in mind and body absolutely accomplished with honorable endowments.

But Oxford outlived the Queen! Also, nothing that we have from his pen was written after his twenty-sixth year. What was he writing during the rest of his life?

Answer: Everything known as that of William Shakespeare.

Now let us turn to the story of the publication of the sonnets. The mystery of Mr. W. H., "Onlie begetter" of the sonnets has at last been solved by Sir Sidney Lee, Colonel R. B. Ward and Charles Barrell. They have shown "Mr. W. H." to have been one William Hall, a government agent. Hall, taking advantage of the confusion upon the occasion of a move by the widowed Countess of Oxford from her home in Hackney, wandered through the house in search of letters which might furnish the address of Father Henry Garnett. He came upon the sonnets in a drawer and took them to Tom Thorpe, the printer, for evaluation. Thorpe recognized a prize, and published them under the title "Shake-Speare's Sonnets". Hall and Thorpe and others knew who had written *Venus and Adonis* and *Lucrece* under this pseudonym.

Now it was one thing for the Veres to ignore the earlier thefts of the Seventeenth Earl's plays, but when his private diary came out with its story of his own seduction, his wife's supposed adultery, his relations with a maid of honor, his duels and consequent lameness, his disgrace and imprisonment, his pursuit of his paramour after her marriage, his attempts to secure control of his illegitimate son, his employment as a government propagandist, his appearance on the stage as an actor —this was going a little too far! (See postscript for clarification.)



Louis P. Benezet has been a teacher at Lawrence Academy and at St. Paul's in Concord, New Hampshire, as well as his alma mater, Dartmouth, and Bradley University. Now eighty years old, he is living in Honolulu. He is the author of eleven books.

They had to decide instantly whether to confiscate the unsold copies and hunt out and destroy those already sold, thus focusing the public's attention upon the family's affairs, or to ignore the whole matter, after a stern warning to T. T., and trust that very few of the readers would be able to translate the cryptic language of the personal narrative.

This latter course they chose. After all, this was 1609, and the most damaging events had occurred as far back as 1576-81. The person who stood to lose most in honor and reputation had died in 1603, and the new monarch could not forget that his own mother had suffered imprisonment and death at Elizabeth's hands.

There was no reappearance of the Sonnets until after all the Oxford children and their spouses were dead. At that, the second edition was a garbled, rearranged collection, with genders of pronouns changed.

But, back to the lies of Heminge,

Condell and Jonson. As we have said, Hall, Thorpe and others of the fields of Drama and Publishing knew who had been writing under the name of "Shakespeare". Publishers angled, stole, hired actors and shorthand experts to write the "Bad Quartos", because the author refused to allow most of the original plays to be printed. After the name "Shakespeare", first heard in 1593, had become famous, more printers dared print purloined plays, confident that a nobleman would never sue them. With Oxford dead, they became bolder. Bonian and Walley, in 1609, boasted of their theft of "Troilus and Cressida", and warned the English people that this man's plays would soon be rare and precious. They said that they had been very lucky in getting this play out of the hands of the "grand possessors" of the rest of the manuscripts. ("This means theatre managers like Heminge, Burbage and Condell", says J. Quincy Adams, reassuringly.) Actually, the manuscripts were in the possession of the Earl of Derby and the Herbert brothers, the Earls of Montgomery and Pembroke, the widowed Countess of Oxford and her son Henry.

As for the tax gatherer of Stratford, seven years after his death, unwept, unhonored and unsung, the de Vere sons-in-law decided that the plays must no longer be denied to the literary world, and someone conceived the idea of publishing the First Folio as the works of this obscure, deceased man of Stratford. His family was happy, for a consideration, to join in the hoax.

It can be shown conclusively that it was the Herbert brothers who in 1623 bore the staggering financial loss that attended the publication of the "Shakespeare" First Folio. No one else involved had money to lose. The cost of the work has been set at close to 6000 pounds, a great fortune in those days. It was printed on gilt-edged paper and bound in embossed leather. The clergy raved—no Bible had ever been so luxuriously bound! Six hundred copies were sold at twenty-two shillings each. The printers, who had been bankrupt in 1620, worked two years on the type setting, solvent, even affluent.

The wills of Heminge and Condell show estates of less than one thousand pounds each. Ben Jonson, who wrote the Address to the Readers and the eulogy of "Shakespeare" was down and out financially, when the Herberts prevailed upon the King to appoint him Poet Laureate. The financial records of the Herbert brothers show that he, Jonson, regularly received from them substantial gifts in money, as did Donne, Massinger, Browne and other writers. Not a penny ever went to anyone named Shakespeare. Ben Jonson contributed nothing to the First Folio except extravagant praise for the author, an apology for the stupidity indicated by Draeshout's engraving of his face, and the fiction about the sources of the manuscripts which Heminge and Condell signed.

The wisdom of the course pursued by Oxford's family is self-demonstrated. To this day only a handful of people in the whole world know the secret history behind the Sonnets, which for three hundred and fifty years have baffled the efforts of the Shakespeare experts to decipher it.

By holding back the publication of the plays until Oxford had been dead eighteen years and paying Ben Jonson, Heminge and Condell a total of some two hundred pounds, slipping a few entries into the Stratford man's will, and erecting a monument in Stratford church with a craftily worded inscription upon it to mystify the populace, the Earls of Derby, Pembroke, Oxford and Montgomery and their wives put over a hoax which has lasted three hundred and fifty years, and is destined to last another fifty if the Folger Library staff can sweep back the rising tide of research and reflection as successfully as they are now doing.

Postscript

The sonnets referred to above as objected to by the de Vere family are in biographical order 121, 57-58, 137, etc., 37, 74, 29, 152, 133-134, 67, 111, 110. However, 66 is the summary and heart of the lot. This is a condensed table of the evil things that have befallen the author.

He has wasted his wealth. He was accused, wrongfully, of leading a Catholic plot against the Queen. She forgave him only upon condition that he forswear his Catholic faith. "And purest faith unhappily foresworn." As a seventeen-year-old boy he trusted the Queen and she took advantage of him: "And maiden virtue rudely strumpeted." "And right perfection wrongfully disgrac'd", in his teens. He was badly wounded and made lame in a duel with Sir Thomas Knyvet, uncle of his mistress. "And strength by limping away disabled." During the Spanish War he drew a salary of a thousand pounds a year. It was a state secret and he was not obliged to report how he spent it. However, he bought a huge house in London and housed there some five or six of his playwright friends—Nashe, Churchyard, Greene, etc., and a flood of patriotic plays kept London mobs in a fighting mood throughout the war. Hallam, Marriott and Tillyard all declare that this propaganda won the Armada battle. Walsingham, head of the Secret Service, was the censor: "No, you must not print that!" "And art made tongue-tied by authority", says the sonnet. "And folly, doctorlike, controlling skill." How Oxford hated to be ordered to falsify history! "And simple truth miscalled simplicity." Oxford, like Hamlet, indulged in quips and veiled thrusts so subtle that bromidic courtiers attributed them to a cracked brain lapsing into childish simplicity. The crucial sentences, of course, concern the sin of the Queen in robbing him of his "maiden virtue", or "right perfection"—wrongly disgraced. There are plenty of confessed sins of his own, but they pale before this unmistakable pillorying of his sovereign.

Fluoridation:

A Study of Philosophies

Fluoridation of drinking water to inhibit tooth decay has brought forth a legal battle in many communities. Mr. Auchter argues that it is a practice that goes beyond the legitimate police power of the state, amounting to a violation of individual rights.

by John R. Auchter •*of the Massachusetts Bar (Springfield)*

THE FEDERAL CONSTITUTION and the constitutions of the various states of the Union have undergone many changes by judicial interpretation from decade to decade. Indeed, it is doubtful that our forefathers would recognize many annotated volumes which delineate the growth and change in political philosophies.

One aspect of this growth and change is apparent in a study of the proposed fluoridation of all public water supplies. Here, we encounter flourishing and indiscriminate use of such terms as "liberal", "conservative", "necessary", "improve", and "reasonable". Court opinions signify basic differences on the same bench as to the use of such terms.

No case is more indicative of these differences and of the struggle between philosophies than *Kaul* v. *City of Chehalis*, 45 Wash. 2d 616, 277 P. 2d 352, one of seven state supreme court cases[1] involving the fight to fluoridate public waters. The Supreme Court of Washington, by a five-to-four decision, affirmed the validity of fluoridation legally and constitutionally.

In the *Kaul* case, Arthur A. Kaul, the appellant, challenged the validity of an ordinance adopted on June 25, 1951, providing:

> That a source of fluoridation approved by the State Department of Health be added to the water supply of the City of Chehalis under the rules and regulations of the Washington State Board of Health, such addition to be administered in a manner approved by the State Director of Public Health.

The trial court made certain findings of fact which were not disputed by the appellant. Among these were the following:

> VI. That although fluoride is a deadly poison used commercially for the extermination of rats and other vermin, the addition to the municipal water supply of Chehalis of a source of fluoride ion, such as sodium silico fluoride, in the proportion of one part per million will not amount to a contamination and the water will continue to be wholesome. That chlorine is added to water to affect either bacteria or plant life in the water, *while fluoride has no effect upon the water or upon the plant life in the water but remains free in the water and is artificially added for the effect it has on the individual drinking the water.* [Italics supplied.]
>
> VII. That dental caries, commonly referred to as tooth decay, is a very common disease of mankind. *That tooth decay is neither infectious or contagious.* That the addition of fluoride to the Chehalis water supply is intended solely for use in prevention of tooth decay primarily in children up to 14 years of age, and particularly between the ages of 6 and 14 and *will prevent some tooth decay in some children.* [Italics supplied.]

The majority opinion made a distinction between the "spread of disease" set forth in the Washington statute and the "spread of contagious diseases" set forth in other statutes and charters; and it cited a number of federal and state cases, among them being *Chapman* v. *Shrevesport, supra; Dowell* v. *Tulsa, supra*; *DeAryan* v. *Butler, Mayor, supra*; *Kraus* v. *Cleveland, supra*, and *Jacobson* v. *Massachusetts* 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

The majority opinion in each of these state supreme court cases supported the constitutionality of fluoridation of public waters, and the prevailing philosophy appears in *Dowell* v. *Tulsa, supra*:

> We think the weight of well-reasoned modern precedent sustains the right of municipalities to adopt such *reasonable* and undiscriminating measures to *improve* their water supplies as are *necessary* to protect and *improve* the public health, even though no epidemic is imminent and no contagious disease or virus is directly involved. [Citing authorities.] Where such *necessity* is established, the Courts, especially in recent years, have adopted a *liberal* view of the health measures promulgated and sought to be enforced. [Italics supplied.]

It would appear that liberalism has been confused with paternalism, and a new definition of "necessity" appears

1. *Chapman* v. *Shrevesport*, 225 La. 859, 74 So. 2d 142; *Dowell* v. *Tulsa*, 273 P. 2d 859; *DeAryan* v. *Butler, Mayor*, 119 Cal. App. 2d 674, 260 P. 2d 98; *Kraus* v. *Cleveland*, 163 Ohio St. 559, 127 N.E. 2d 609; *Baer* v. *Bend*, 206 Or. 221; *Froncek* v. *Milwaukee*, 269 Wis. 276, 69 N.W. 2d 242.

Hausamann-Steiger's

John R. Auchter was admitted to the Massachusetts Bar in 1952. He received his A.B. from Amherst College in 1947 and his LL.B. from Northeastern University in 1950. During World War II he served in the Army, spending eighteen months in New Guinea and six in the Philippines.

to demean the practice of medicine and dentistry as we have known them; that is, diagnosis by one's own physician or dentist of one's own unique condition in one's own unique body. Further, the court assumes that it is "necessary" to fluoridate water in order to "protect" and "improve" the teeth. This assumption ignores the fact that fluorides are available by prescription for so-called topical application to teeth and for use in water, salts or milk. And when we are then informed that fluoridation is not medication, we are faced by the even more baffling suggestion that it is "necessary" to provide nutrition through public water supplies.

The traditional view, as expressed in the *Kaul* case, is found in the dissenting opinion of Mr. Justice Hill:

> The significant circumstances are that the ordinance is designed solely for the purpose of effecting the application of fluorine to the teeth of the residents of Chehalis in order to minimize tooth decay in some children. The use of the city water system as a means of accomplishing this purpose means that the aforesaid "treatment" becomes compulsory for any person who has to rely upon the city water supply as his source of drinking water. Thus the liberty of which appellant is deprived is the right to decide of his own free will whether he desires to apply fluorine to his teeth for the purpose of preventing tooth decay, based upon his own opinion as to whether it would be advantageous or disadvantageous to his personal health—a matter, incidentally, on which there is marked and bitter divergence of opinion within the medical and dental professions.
>
> It must be conceded that this is a personal liberty which falls within the constitutional protection of due process.

Until the legal profession was faced by these latest decisions by certain state courts, it could rely upon the principle set forth in the opinion of Mr. Justice Harlan in *Jacobson* v. *Massachusetts, supra*, where the Supreme Court of the United States presented a test of the validity of compulsory health regulations:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, *under the pressure of great dangers*, be subjected to such restraint, to be enforced by *reasonable* regulations, as the safety of the *general* public may demand. [Italics supplied.]

In this regard, Mr. Justice Hill in the *Kaul* case went on to point out:

> While dental caries may be termed a "disease" which is prevalent in the teeth of almost every one, it is not contagious or communicable in any way. Dental caries in no way endangers the public health in the sense that its existence in the teeth of one individual might adversely affect the personal health of any other individual. To thus extend the concept of "public health" would open the door to compulsory mass medication or preventive treatment for any disease, solely on the ground that it is for the individual's own good, without regard to his inherent right to determine such matters for himself.

And then, referring to the majority opinion of Mr. Justice Weaver, Mr. Justice Hill continued:

The majority cites cases approving fluoridation, each making a plausible case for it. They all say, in effect, as the majority say here: "We fail to see, however, where any right of appellant, guaranteed by the constitution, has been invaded." It would, of course, be easier to see if the ordinance under question required every resident of Chehalis (or even every child under fourteen years of age resident therein) to present himself or herself for topical application of fluorides by public health authorities. On the showing here, it would not even be contended that such an ordinance would be constitutional; yet the instant case is no whit different. What the residents of Chehalis could not be compelled to do one by one, it is now sought to compel them to do *en masse*; a treatment to which they individually could not be compelled to submit is here sought to be applied by more subtle but no less compulsory means. This smacks more of the police state than of the police power.

But Mr. Justice Hamley, joining Mr. Justice Hill by presenting another minority opinion, really rips the robe of reason from the majority opinion in these words:

> The alternative theory upon which the majority opinion seems to be based seeks not to disclaim compulsion, but to defend it. The two cases cited in this section of the majority opinion sanctioned compulsory vaccination to protect against a contagious disease. The majority infers that the result would have been the same had the compulsion related to a noncontagious disease.
>
> This alternative theory appears to follow this process of reasoning: The protection of public health is a valid exercise of the police power; the protection of public health includes protection from the introduction or spread of both contagious and noncontagious diseases; therefore, it is immaterial that the disease of dental caries is noncontagious rather than contagious.
>
> In this process of reasoning, the majority, I believe, overlooks a very important limitation upon the exercise of the police power, which is that, whether the police power is being exercised for the protection of public health or any other reason, it may not extend to the point of impairing a constitutionally guaranteed personal right, unless justified by "conditions essential to the equal enjoyment of the same right by others" (*Crowley* v. *Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 11 S. Ct. 13), or by "pressure of great dangers" (*Jacobson* v. *Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct.

558). It is because of this limitation on the exercise of the police power that the courts have drawn a distinction between contagious and noncontagious diseases. *Jacobson* v. *Massachusetts*, supra; *Blue* v. *Beach*, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195. Where it is shown that, because of the contagious nature of a disease, a serious threat to public health is presented, the tests referred to above, for determining whether the exercise of the police power can extend to the impairment of personal rights, have been met. By necessary inference, where it is shown that a disease is not contagious, these tests have not been met, and the indicated limitation upon the exercise of the police power applies.

The fact that dental caries is not a contagious disease is therefore material, since it is thereby established that the limitation on the exercise of the police power applies in this case. Any other view would, it seems to me, be an admission that the courts have been fooling all of this time when they have said that it is a valid exercise of the police power to interfere with constitutionally guaranteed personal liberties, where necessary to prevent the introduction or spread of contagious or communicable diseases.

The principle being established by the majority opinion, even more than the specific deprivation of personal liberty here accomplished, warrants deep concern. The case before us deals with what some will regard as a relatively minor aspect of dental health. But the principle announced is not so limited. It would be equally applicable if fluoridation (or iodination) was being relied upon to counteract goiter or any other noncontagious bodily malady. What future proposals may be made to treat noncontagious diseases by adding ingredients to our water supply, or food, or air, only time will tell. When that day arrives, those who treasure their personal liberty will look in vain for a constitutional safeguard. The answer will be: "You gave the constitution away in the *Kaul* case."

The impact of the fluoridation cases in their broader aspects probably will not be felt for some time; but their implications are tremendous. Surely, we have a redefinition of a "liberal", who, in the days of the founders of our country, was he who fought any invasion of his personal liberties. Indeed, it was in 1771 that Samuel Adams affirmed:

> If the liberties of America are ever completely ruined . . . it will in all probability be the consequence of a mistaken notion of prudence, which leads man to acquiesce in measures of the most destructive tendency for the sake of present ease.

As free men, we are dedicated to the proposition that there will never be a substitute for self-discipline and that compulsion, however subtle, ought not to be substituted for education and persuasion.

As free men, we must be mindful that the democratic process involves much more than the will of the majority. As Sir Edwin Savory Herbert, then president of the Law Society of England, pointed out in his address before the Assembly of the American Bar Association at Dallas, Texas:

> We must remember too that just as our common law man does not derive his rights from the state, so also he does not derive his power merely from being in a majority...
>
> We have to learn that this so-called "democratic" idea is capable of becoming at least as heavy a tyranny as the rule of kings, or aristocrats, or dictators, and that in some totalitarian countries this conception of a fleeting majority's will as being in itself just, has been the means of establishing the tyranny. We all hated the tyranny of Hitler. Let us not forget that he obtained a majority in the Reichstag by constitutional means and relied upon a majority throughout...[2]

Here the battle lines have been drawn: individual responsibility versus the police state, education versus compulsion, self-discipline versus paternalism. As we seek our way out of the dilemma, we would do well to be mindful that a man is free because he is responsible, and he is responsible because he is free.

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2. *The Common Law Man* by Sir Edwin Savory Herbert, AMERICAN BAR ASSOCIATION JOURNAL, November, 1956, Vol. 42, No. 11.

A Short Course for Defense Lawyers in Criminal Cases and a Short Course for Prosecuting Attorneys

Northwestern University School of Law will conduct its third annual Short Course for Defense Lawyers in Criminal Cases during the five-day period, July 18-23, 1960. It is open to all attorneys interested in the practice of criminal law.

The fifteenth annual Short Course for Prosecuting Attorneys will be conducted at Northwestern during the five-day period, August 1-6, 1960. Attendance is restricted to attorneys holding state or federal offices as prosecutor or assistant prosecutor; to attorneys who are nominees for the office of prosecutor at the next election; and to legal personnel in the Armed Forces.

For copies of the Short Course programs, and for other information, write to Professor Fred E. Inbau, Northwestern University School of Law, Chicago 11, Illinois.

Taxation Without Representation Modernized

Mr. Britton believes that the current practice by many states of taxing non-resident businesses with respect to extraterritorial value poses a grave threat to the federal system. This is the second part of Mr. Britton's article on this problem; the first portion appeared last month (46 A.B.A.J. 369).

by Floyd E. Britton • *of the Illinois Bar (Chicago)*

IN PART I OF THIS article thoughts were developed that the hue and cry aroused by the recent *Northwestern States-Stockham Valves* decision[1] by the United States Supreme Court and the so-called "taxation of interstate commerce" represents the same basic sense of outrage that troubled the colonists nearly two hundred years ago, taxation without representation; that the real problem involved is the extensive practice of states helped along and in part even required by courts of exempting resident businesses from tax with respect to values and transactions within the state and reciprocally taxing politically ineffectual non-resident businesses with respect to extraterritorial values and transactions; and that such practice extends not only to net income taxes but also to state taxes based on capital stock, net worth and other like value and even to sales and use taxes.

The rigging of formulas for apportioning among states capital stock, net worth and net income value in favor of home industry and against non-resident businesses was discussed at some length but not exhaustively.

A comparison was drawn between (a) apportionment formulas in which in a sales or receipts factor sales are allocated to destination and (b) sales and compensating use taxes. It was pointed out that in both cases the effect is to exempt resident businesses from tax proportionate to shipments out of state and to subject non-resident sellers with a jurisdictional "nexus" in the state to a tax proportionate to shipments into the state. And it was suggested that the interstate commerce clause had been applied so as to work in effect in reverse by exempting from tax shipments out of state (which should be subject to any general sales tax) thus inducing rather than restraining interstate commerce and by taxing value represented by shipments *into the state* thus restraining non-resident sellers from seeking and accepting orders requiring such interstate shipment; and that the due process clause had not been permitted to do its full duty in the solution of the many problems involved.

It was suggested that the doctrine established under the due process clause which prohibits states from taxing property or other value outside the territorial limits of the state should be the basic approach to these apportionment problems involving shipments interstate so that if only that value is allocated by an apportionment formula which may reasonably be considered as within the state, then taxation of extraterritorial value as to non-resident businesses is avoided and the tax could not as a practical matter be an unreasonable restraint on interstate commerce even as to shipments interstate.

It is now proposed to discuss the doctrine of extraterritorial value more fully and especially in its relation to a sales factor in which sales are allocated to destination and the "exploitation of the market" theory supposedly justifying it. It is then proposed to suggest a congressional approach, under both the commerce and due process clauses to the over-all problems of sales and use taxes and the apportionment among states of capital stock, net worth, net income and other like value.

A review of some of the cases in which this standard has been iterated and reiterated will be helpful.

As already noted in the previous article, in *Wallace* v. *Hines*,[2] a unanimous Court speaking through Mr. Justice Holmes, said as early as 1919 in respect to apportionment formulas:

> The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they would otherwise possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state.

Here in a few simple words the great

1. *Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, 4 STC Par. 200-002 (1959).

2. 253 U.S. 66, 64 L. ed. 782 (1919).

Justice erected a "firm peak of decision" of Paul Bunyan stature towering high above the "quagmire" of "tangled underbrush of past cases" through which the Court in *Northwestern States* and *Stockham Valves* sighted a few lesser peaks rising from *another* range—interstate commerce. This towering "peak of decision" in *Wallace* v. *Hines, supra,* is, or at least should be, *a basic point of beginning in any case requiring the application of the due process clause to state taxation.* If a state is obliged, as it often is, of course, to look beyond its own borders in order to get the true value of that which is within it, it is entirely right that it should be permitted to do so *but only for that purpose.* It may not, Justice Holmes says, look beyond its own borders *in order to open to taxation what is not within the state.* To do so he says would expose the "system", *i.e.*, the "unitary business" to a *mortal* dart.

In the light of current state tax practices and the interpretation generally placed upon judicial decisions *the heels of non-resident businesses now stand exposed to the very mortal dart which Justice Holmes and the other Justices for whom he spoke so clearly foresaw.* The term "mortal" was not used loosely. If states are permitted to look beyond their own borders in order to open to taxation what is not within the state *the literal death of many non-resident businesses, especially expanding small businesses, is inevitable.* The recent hearings before the Select Committee of the Senate on Small Business made this clear and any thoughtful person will agree.

In *Underwood Typewriter Co.* v. *Chamberlain*[3] the Court in 1920 reiterated this standard asserted so clearly in *Wallace* v. *Hines, supra,* as follows:

> It [the Legislature] therefore adopted a method of apportionment which for all that appears in the record, reached, and was meant to reach, *only the profits earned within the state.* (Italics supplied.)

In *Bass, Ratcliff & Gretton* v. *State Tax Commission*[4] the Court cited *Underwood Typewriter, supra,* as controlling and quoted extensively from the opinion including the sentence above quoted. It also cited with approval *Wallace* v. *Hines, supra,* saying:

> In Wallace v. Hines, 253 U. S. 66, 69, 64 L. ed. 782, 40 Sup. Ct. Rep. 435, it was recognized that a state, in imposing an excise tax upon foreign corporations in respect to doing business within the state, may look to the property of such corporations beyond its borders to "*get the true value of things within it,* when they are part of an organic system of wide extent," giving the local property a value above that which it would otherwise possess, and may therefore take into account property situated elsewhere when it "can be seen in some plain and fairly intelligible way that it adds to the value of the property and the rights exercised in the state." *This is directly applicable to the carrying on of a unitary business of manufacture and sale partly within and partly without the state.* (Italics supplied.)

The Court did not quote but certainly did not overlook or disapprove of the very next sentence in the opinion in *Wallace* v. *Hines, supra:* "The purpose [of looking beyond the borders to get the value within] is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state." This is, of course, also applicable to any "unitary business".

In *Alpha Portland Cement Co.* v. *Massachusetts*[5] the Court in 1925 said in respect to an apportionment formula and an excise tax measured by net income and corporate excess:

> It must be regarded now as settled that a state may not . . . tax property beyond her borders. . . The 14th Amendment does not permit taxation of property beyond the state's jurisdiction . . .
>
> * * *
>
> The local business of a foreign corporation may support an excise measured in any reasonable way if neither interstate commerce *nor property beyond the state is taxed.*

In *Hans Rees and Sons* v. *North Carolina*[6] the Court in 1931 again reiterated the rule as follows:

> When, as in this case, there are different taxing jurisdictions, each competent to lay a tax *with respect to what lies within, and is done within its borders,* and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method which, albeit fair on its face, operates *so as to reach profits which are in no sense attributable to transactions within its jurisdiction.* (Italics supplied.)

In *A & P Tea Company* v. *Grosjean*[7] the state had looked at the number of retail stores beyond its borders in order to determine the true value of the stores within the state and the Court upheld it but cautioned:

> The state may not tax real property or tangible personal property lying outside her border; *nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.* (Italics supplied.)

The *Grosjean* case, *supra,* is a perfect example of Justice Holmes' observation in *Wallace* v. *Hines, supra,* that a state may look beyond its own borders in order to get the true value of things within it but not otherwise and that the necessity for determining by a formula the relative value of the portion of a "unitary business" which is within the state does not "open to taxation what is not within the state".

In the famous *Butler Bros.* v. *McColgan*[8] case, the Court in 1942 said with respect to apportionment of value represented by net income:

> One who attacks a formula of apportionment carries a distinct burden of showing by "clear and cogent evidence" *that it results in extraterritorial values being taxed.* . . . (Italics supplied.)

And the Court added that in the *Hans Rees* case, *supra,* this burden of showing extraterritorial value had been maintained on a showing that the income attributed to the taxing state was "out of all appropriate proportion to business transacted" by the taxpayer in that state.

In the recent cases of *Northwestern States Portland Cement* and *Stockham Valves, supra,* the issue of reasonableness of the apportionment formula had been deliberately avoided by the tax-

3. 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165, 1 STC Par. 255 (1920).
4. 266 U.S. 271, 69 L. ed. 282 (1924).
5. 268 U.S. 203, 45 S. Ct. 477, 69 L. ed. 916, 1 STC Par. 246 (1925).
6. 283 U.S. 123, 51 S. Ct. 385, 75 L. ed. 879, 1 STC Par. 283 (1931).
7. 301 U.S. 412, 57 S. Ct. 772, 81 L. ed. 1193, 112 A.L.R. 293 (1937).
8. 315 U.S. 501, 62 S. Ct. 701, 86 L. ed. 991, 1 STC Par. 258 (1942).

payers but the Court was careful to point out that:

> The taxes here, like that in *West Publishing Co.* v. *McColgan, supra,* are based only upon the net profits *earned in the taxing state.* (Italics supplied.)

The Court also said, after a review of many cases:

> These cases stand for the doctrine that the entire net income of a corporation generated by interstate as well as intrastate activities may be *fairly* apportioned among the states for tax purposes by formulas *utilizing instate aspects* of interstate commerce. (Italics supplied.)

This means (unless it is just some more "tangled underbrush") that an apportionment formula to be fair and reasonable may use as a measuring rod *in-state* activities of the shipper even though they relate to interstate commerce. It does not mean, however, that the formula may utilize interstate commerce itself or *out-of-state activities of the shipper, i.e.,* the shipment into the state on orders of the purchasers, as a measure of value *within* the state, or as a means of opening to taxation what is not within the state. The sales price of goods shipped into a state by direction of the purchaser stated as a percentage of total sales does not seem to represent "in-state aspects of interstate commerce" *nor to constitute a measure of the productivity of any "in-state aspects" of that commerce.*

It may be said that the Supreme Court has been giving mere lip service to the concept of extraterritorial value. Despite an apparent blindness to evidence of extraterritorial value, however, the Court from a purely technical standpoint, in view of the way it reports the issues to have been presented, has left itself a clear field in all of the cases for determining whether in any particular case extraterritorial value is taxed in violation of due process by allocating sales to destination or by any other apportionment formula.

The basic test of unreasonableness of an apportionment formula under the due process clause is clearly this concept of "extraterritorial value" and corresponding exemptions of within state value. This should never be lost sight of. Indeed, there can hardly be any other logical test consistent with this federal system of ours. Let each state *as to non-resident businesses* tax what value may reasonably be considered as *within its own borders* and let the Fourteenth Amendment be the basic arbiter of disputes. The commerce clause by backstopping due process will then largely, if not entirely, take care of itself, the possibility of the taxation of the same value by two or more states will be avoided, unreasonable taxation without representation will not plague non-residents, and states will be deprived of an incentive to exemption of residents from tax on value within the state.

It is against this background that it is proposed to examine the constitutional and economic aspects of an apportionment formula in which in a sales factor sales are allocated to destination.

Now if we center our attention on due process and the taxation of extraterritorial value it seems perfectly obvious that net income of non-resident businesses *having no property or activity whatever* in a state is not earned nor is capital stock, net worth, or other like value of such non-residents present within the territorial limits of the state proportionate to shipments into the state. This is universally acknowledged to be true, at least for the time being, both in fact and law; *were it otherwise shipments into the state would form their own jurisdictional "nexus".*

For example, assume that Corporation A with home office in State X has its only manufacturing plant in that state and pursuant to contract made there with Corporation B ships all of its manufactured product to Corporation B's plant in State Y. Corporation A has no connection with State Y except the shipment of goods to Corporation B's plant in that state. It is universally acknowledged for the time being at least, that no part of Corporation A's net income could be considered as being earned and no part of its capital stock or net worth value could be considered as being present in State Y for purposes of taxation. State Y could not tax Corporation A for the simple reason that there would be no property, activity, or other value in State Y upon which a tax could be laid or by which a tax could be measured. *Mere shipments into a state by nonresidents at the direction of purchasers obviously do not form their own jurisdictional "nexus" for taxation nor measure or tend to measure taxable value within the state whether that value be capital stock, net worth or net income.*

But it seems just as obvious that this is true even when there is a "nexus" of local property or activity which itself produces value in the state which is otherwise measurable in an apportionment formula as, for example, by property and payroll factors.

For example, assume that Corporation A in the illustration above decided at the suggestion of Corporation B to maintain an employee at Corporation B's plant in State Y to assist in checking in the goods as received and in general acting as a liaison man between the two corporations. Assume that Corporation A maintains an office in State Y which this employee uses as his headquarters consisting of a desk, a few chairs and a filing cabinet and that the whole constitutes a sufficient jurisdictional "nexus" permitting State Y to impose a tax on *a proportion* of Corporation A's entire capital stock, net worth or net income value *within* the state. And suppose that State Y apportions ⅓ on the ratio that the office equipment in State Y bears to total tangible property (say, 0.1%) and another one third on the ratio that the salary of the single employee in State Y bears to total payroll (say, 0.2%) and attempts to apportion the remaining one third of entire net income, capital stock or net worth value on the ratio of shipments into the state to total sales, *i.e.,* 100 per cent.

Is it possible that the existence of the single employee with a desk, chair, and filing cabinet constituting a "nexus" in State Y "opens to taxation" 100 per cent of one third of entire capital stock, net worth or net income value of Corporation A no part of which was within State Y in the absence of this little "nexus"? Is 100 per cent of one third of entire capital stock, net worth, or net income value within or without the territorial limits of State Y depending on the presence in or absence from State Y of the little "nex-

us"? These questions seem to answer themselves in the negative.

But if perchance it be claimed that these questions should be answered in the affirmative what *constitutional* provision would require State Y to use the three-factor formula or prevent State Y from using a single factor of sales allocated to destination thus taxing Corporation A upon 100 per cent of its entire capital stock, net worth or net income value merely because it was foolish enough to try to facilitate the receipt of the goods into State Y and eliminate incipient controversies by maintaining the little "nexus" in that state?

And in the meantime what happens to Corporation A in State X where the goods were produced and sold? Well, if State X also used a three-factor formula and allocated sales to destination it would have, prior to "nexus" in State Y, taxed Corporation A on 100 per cent of one third of taxable value by a tangible property factor and 100 per cent of another one third on the payroll factor. It would probably have taxed the remaining one third on the sales factor allocating sales to point of origin during the time Corporation A maintained no "nexus" in State Y. In other words, since it could not allocate sales to the state of destination because Corporation A maintained no "nexus" in that state it would tax 100 per cent of that one third also.

However, as soon as Corporation A began maintaining the little nexus in State Y, State X would allocate sales to destination and thereby *exempt from taxation in State X* one third of the entire capital stock, net worth or net income value of Corporation A. The effect would be that 100 per cent of one third of entire capital stock, net worth or net income value would be considered as being within the territorial limits of State X or State Y depending on the seemingly irrelevant circumstance that the corporation maintained or did not maintain a nexus however small in State Y. As applied to income taxes this is the literal effect of the Uniform Division of Income for Tax Purposes Act proposed by the Commissioners on Uniform State Laws.

Now, if in such circumstances State X wants to exempt a substantial amount of taxable value merely because of a little nexus in another state, Corporation A may not be able to complain, but the illustration does demonstrate the ridiculous results of the "nexus" doctrine and allocating sales to destination. The illustration demonstrates that shipments into a state by non-residents *at the direction of and pursuant to contract with purchasers* simply do not measure or tend to measure value within the state in the absence of a "nexus" or the relative productivity of any local property or activity which may form a "nexus".

Allocation of sales to destination as applied to non-resident shippers into the state exaggerates out of all reasonable relation to the truth the productivity of any property or economic activity in the state. It therefore taxes extraterritorial value. Of all the places to which sales have been allocated in an apportionment formula, destination seems clearly to overestimate to the greatest extent the relative productivity of any property and economic activity there may happen to be in a state.

Claimed Justification for Allocation of Sales to Destination

Supporters of allocation of sales to destination in effect confess, it seems, that of course net income is not really earned and that, of course, capital stock value is not really present within the territorial limits of a state proportionate to shipments into the state. They avoid the conclusion by assuming that extraterritorial value is no longer the standard of unreasonableness of an apportionment formula. They assume that due process no longer prohibits the taxation of extraterritorial value or of net income not earned within the state. *They assume that the necessity for apportioning value between two or more states opens to taxation what is not within the state.* The effect of what they say is that any taxpayer doing a "unitary business" is not entitled to the protection of the Fourteenth Amendment if it maintains a jurisdictional "nexus" however small in the state.

There is perhaps some support for this view in the welter of confused thinking to be found in the decisions—the "tangled underbrush of past cases" referred to by the Court in the *Stockham Valves* decision. However, no workable substitute for the extraterritorial value standard has been pointed out and in any event Congress acting under the Fourteenth Amendment and the commerce clause need not be bound by anything the Court has said on the subject.

The "Benefit" or "Exploitation of the Market" Theory of Taxation

Supporters of the allocation of sales to destination seek to justify this abandonment of the extraterritorial value standard by resort to the "benefit" or "exploitation of the market" theory of taxation. The state it is said furnishes a market which the foreign shipper exploits and provides judicial and other governmental protection to the foreigner while he is so engaged in exploiting the local citizenry. For this *privilege* of exploiting the local citizenry the foreign shipper, it is said, should pay a tax *on account of and proportionate to his shipments into the state* even though this taxes extraterritorial value.

The benefit theory is clearly false. States do not furnish a market for or confer any other benefit on foreign shippers into the state. They furnish a stable government for the benefit of their own residents and under which their own residents may live in tranquility and acquire sufficient money or credit to satisfy their wants by purchasing goods and services from any available source under the jurisdiction of the United States. Indeed, one does not note in the preamble to any state constitution a recital to the effect that "We the people hereby form a government in order to insure a market for the goods of non-residents—poor things".

Except for the prohibitions in the commerce clause and the Fourteenth Amendment, no state would permit non-residents to ship any goods into the state except to the extent that such shipments were deemed to benefit the state and its residents. This is true among nations, was true as to states

under the Articles of Confederation, and undoubtedly would be true as to states now in the absence of the Fourteenth Amendment and the commerce clause. *Whatever benefit shippers into a state receive, they receive from the Federal Constitution and not from the state.* A state ought not to be able to *impose a tax on or with respect to a privilege derived from and protected by the commerce clause and the Fourteenth Amendment.* Compare what the Court said in the *Grosjean* case, *supra:*

> . . . nor may [a state] lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.

Competition

It is also said that home industry should not be required to compete with foreign shippers exploiting the local market without paying taxes proportionate to their shipments into the state. That, however, is exactly the competition which the commerce clause and the Fourteenth Amendment were designed to insure. That is exactly what "free trade among the states" means.

Not only does the commerce clause insure free competition between non-resident and resident businesses for the local market. *the inherent nature of the federal system tends to force states into competition with each other to provide better and better governmental services to industry, both resident and non-resident, at the lowest possible tax cost in order to attract industry to them.* States do not like this competition with other states in providing low cost efficient government. They are continually in fear of the effect of additional taxes in driving home industry from the state. They endeavor to reduce this competition with other states by taxing non-residents on extraterritorial value and exempting home industry from tax on value within the state. They do this in the hope that home industry will stay in the state and perhaps suffer from inefficient government rather than become a non-resident subject to tax on extraterritorial value. *Free competition for the state's markets and free competition between states in respect to governmental services is at the very heart of the federal system. The trend of state taxation is toward the destruction of both.*

Income from Sources Within the State

Supporters of allocation of sales to destination really throw a fast curve, however, in the use of the phrase "income from sources within the state". Here they really confuse the issue by confusing net income with gross income. Net income is, of course, not necessarily earned at the source of the gross. *The place of the source of net income is necessarily the place where it is earned,* not the place to which the goods were shipped or the place where the purchaser resides or where he got the money with which to pay their purchase price. The *place* of the source of the price or *gross* income is irrelevant. The phrase "income from sources within the state" is used, of course, internationally where taxes on gross income "at the source" are valid, the Fourteenth Amendment being inapplicable but as applied to state taxation it is clearly redundant and adds nothing whatever but confusion and lots of it to the phrase "earned within the state".

The "Nexus" Doctrine

The *nexus* doctrine seems somehow to be assumed by many to imply approval of the allocation of sales to destination and consequently of the taxation of extraterritorial value although it is not so expressed. *The nexus doctrine, however, merely prohibits the taxation of value which due process might otherwise regard as within the state. It does not and must not be permitted to "open to taxation what is not within the state".*

For example, it must be conceded that itinerant salesmen in a state (although not constituting a sufficient "nexus" under the recent act of Congress) could reasonably and without doing too much violence to *due process* be regarded as contributing to the production of taxable value within the state proportionate, say, to the salaries paid them for services actually rendered in the state. *Overriding considerations, however, mainly under the commerce clause preclude it.* Taxing the proportion of net income, capital stock, or other like value of foreign businesses *represented and measured by such local activity* would, the nexus doctrine and the recent act of Congress in effect assert, operate to impede the free flow of goods in interstate commerce. In other words, when a businessman sends a salesman into another state to acquaint residents of that state with the merits of his product, he may be willing to gamble the salesman's salary and expenses that some profitable business will result but he ordinarily would not be willing to commit himself in advance to the expensive job of making tax returns to that state and of paying a tax on a portion of his entire net income proportionate to the salesman's salary whether or not the salesman's trip proved profitable.

Moreover, personal solicitation is a form of advertising. To impose a tax on a non-resident business merely because of personal solicitation in the state would constitute an unfair and unwise discrimination against that form of advertising and in favor of other forms of advertising. Those businesses in which personal solicitation happens to be advantageous would be penalized. Free trade among the states would suffer by such singling out for tax of one form of advertising.

However, given sufficient activity and property in the state to form a "nexus", the state is free, the doctrine holds, to tax the value *produced within the state by such local activity and measured by it* even though its production involves interstate shipment of goods. But the presence in the state of a "nexus" which may consist of only one minor employee with a desk and chair *does not and must not be permitted to open to taxation value which would not be within the state in the absence of the nexus.* There is nothing inconsistent with this in the *Northwestern States-Stockham Valves* decision.

The object of any apportionment formula is to determine what value is, and is not, reasonably to be regarded as within the territorial limits of the state and there subject to tax. The object of the nexus doctrine is or should be to prevent the taxation of values of

foreign businesses which otherwise might be considered to be within the state but to tax which would unduly impede the free flow of goods in interstate commerce. Neither the necessity for apportionment of value nor the nexus doctrine destroys the well-settled principle that due process prohibits a state from taxing non-resident businesses on extraterritorial value either directly as a tax on property or indirectly as a measure of an excise on a privilege. Neither exposes the heel of foreign businesses to a mortal dart, as Justice Holmes expressed it. Neither opens for taxation what is not within the state.

The amount of a tax on the extraterritorial value of non-resident business apportioned to a state by allocating sales to destination *would vary directly with the ratio of shipments into the state to total sales.* Non-resident shippers into the state would therefore be strongly influenced to keep the ratio to a minimum by reducing to a minimum or foregoing entirely the acceptance of orders requiring shipments into the state. The free flow of goods in interstate commerce would thus be directly impeded.

It may be claimed that while allocation of sales to destination may impose a tax on interstate commerce, the fact is so covered up in a complicated mathematical formula that the non-resident taxpayer will not in practice relate the tax directly to each shipment into the state. In consequence it may be said that the tax is as a practical matter an *indirect* tax not in fact burdening interstate commerce. This is false. Any businessman worth his salt can figure the approximate cost in state taxes per dollar of shipments into the state based on an educated estimate of his current year's ratio of net to gross income. On a three-factor formula he would simply multiply one third of his expected ratio of net to gross income by the state tax rate. He would thus arrive by simple multiplication at the rate of minimum tax on each dollar of shipment into the state. The amount of the anticipated tax even on that one third of net income might make the difference between accepting and declining orders requiring shipment into the state. Such a tax differs from a straight import duty only in the fact that it is payable after instead of at the time of the shipment into the state.

In any event as the Court so profoundly observed in the *Alpha Portland Cement* case, *supra:*

> The introduction of an extremely complicated method for calculating the amount of the exaction does not change the nature of the tax, nor mitigate the burden.

In a seller's market when demand exceeds supply, the taxation of net income, capital stock or net worth value measured by shipments into a state could be especially serious. *When demand exceeds supply or when the tax on the non-resident seller, plus his expenses of keeping records and making tax returns exceeds what he can pay and still make a profit, orders requiring shipment interstate simply will not be accepted.* The wants, perhaps needs, of the would-be resident purchasers *to that extent* go unsatisfied, free trade among the states to that extent dies aborning and the fallacy of the "benefit" theory of the taxation of non-residents on extraterritorial value is clearly exposed as founded upon a false premise.

Use Taxes

It will be observed, of course, that there is no essential difference between taxing non-resident sellers on a proportion of net income, capital stock, or net worth value *measured by sales requiring shipment into the state* and a liability on the same non-residents for the purchasers' use tax *measured by the same sales* except that in the latter case the amount of the use tax may, and in the former case the amount of the net income tax may not as a practical matter, be passed on to the purchasers.

The fact, however, that the amount of the use tax may be passed on to the purchasers does not take care of the additional cost to the non-resident sellers in keeping records and making quarterly or perhaps monthly use tax returns.

Even if the non-resident seller is given a right to deduct a percentage of the use tax as partial compensation to him for his trouble the actual cost of making quarterly or monthly use tax returns often exceeds the total amount of the tax. The "collection fee" would cover actual expenses as to those non-resident sellers only who regularly ship a considerable volume of goods quarterly or monthly into the state. Innumerable businesses do not ship enough goods into a state during any one month or quarter to warrant the expense of determining and keeping evidence as to whether the goods were to be resold or used and if the latter of adding the tax to the price and making monthly or quarterly returns to the states into which the goods were shipped even though the offered "collection fee" were liberal.

Moreover compensation for *abridgment* by states of rights and privileges conferred upon citizens of the United States by the Federal Constitution can *never* be adequate or satisfy the Fourteenth Amendment.

All but thirteen states now have sales taxes. Normally a sales tax paid in the state of the shipper either exempts the goods from use tax in the state of the purchaser or constitutes a credit against the tax. How simple it would be therefore to avoid all this stifling of interstate commerce and the taxation of non-residents in violation of due process if each state were to tax all retail sales made in the state, *even though the purchaser directs shipment to him or another in another state.* Except as to retail sales in the relatively few states having no sales tax and except for differences in rates, there would then be no need for a state to supplement its sales tax by a use tax. The residents of each state would then be free to buy wherever they pleased in the United States, as the commerce clause intended, without evading any sales tax, and free trade among the states would be freed from an incubus which is in truth burdening. Its burden will grow even bigger and heavier as time goes on. *If retail sales requiring shipment out of state were not exempt from a sales tax, there would no longer be any substantial need for a compensating use tax.* To the extent that there would remain any real need for a compensating use tax, Congress could stifle it as it did with respect to cigarette taxes by requiring non-resident shippers *from*

states having no sales tax merely to report the shipments to the sales tax department of the state of the purchaser.[9]

Scope of Congressional Action

Congress must come to the rescue not only of the politically ineffectual non-resident businesses which the courts have miserably failed to protect but *also and even more importantly to the rescue of the public policy* in respect to state taxes embodied in the Fourteenth Amendment and the commerce clause. The good health of the national economy in the federal system requires no less. It seems clear that if Congress limits its study of the problem merely to the allocation of net income, it will be dealing with only a part of a much broader and deeper problem involving sales and use taxes and the allocation of capital stock, net worth, or other like value as well as of net income value for purposes of state taxation.

The power of Congress to deal with the entire subject of state taxation of non-residents with respect to transactions occurring and property and other value situated beyond the states' own borders lies primarily in the due process clause of the Fourteenth Amendment. Congressional power under the due process clause in respect to state taxes is much broader than under the commerce clause. Under the Fourteenth Amendment Congress may prohibit the imposition of any state tax which would "abridge the privileges or immunities of citizens of the United States" or "deprive any person of . . . property without due process of law" or "deny to any person within its jurisdiction the equal protection of the law". Under the commerce clause it may only "regulate commerce . . . among the several states". Congressional action should be based *primarily* on the power of Congress under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article".

Importance of Prompt Congressional Action

The importance of prompt congressional action with respect to all of these state tax problems cannot be overestimated. States are rapidly perfecting techniques of collecting these taxes against non-resident shippers. It is becoming more and more hazardous for a growing business to seek and accept orders from without its own state if shipment out of state is required. The non-resident businesses generally do not know when the first few orders are received from additional states whether sufficient orders will be received from such states to warrant setting up a tax and record-keeping department capable of making the necessary monthly or quarterly tax returns to all or even a few of the states from which such orders may be received. Moreover, many businesses simply do not have the necessary capital or profit margin to permit it.

The natural inclination of non-resident businesses is, of course, to accept all incoming orders and take a chance on not getting caught with deficiencies and penalties which they cannot pay. Unquestionably small businesses all over the country have subjected themselves to millions of dollars of potential use tax and income tax deficiencies. Many of these businesses would be bankrupt were the states to catch up with them. The states will without question, however, develop techniques of catching up with these non-resident shippers into the states.

States are being and will continue to be not only energetic and competent but quite ruthless about it. The attachment of Miller Brothers' truck by Maryland in the *Miller Brothers* case[10] is an example. Salesmen interviewing potential customers in a state are already being harrassed. Threatening letters are being written. More and more states are adopting reciprocal laws permitting the collection of taxes by foreign states in the local courts. Jurisdiction for service of process in local courts is being greatly extended.

It will not be long before states as the most obvious and efficient way of collecting use taxes and net income taxes measured by shipments into the state will *require a license* or, if a corporation qualification, *before permitting any non-resident business to ship goods into the state.* Indeed, registration is already required by many states with respect to use taxes and the last step in enforcement will no doubt be a bond to secure collection and payment over of all use taxes and the payment of all net income taxes measured by shipments into the state.

Suggested Congressional Action

Congress cannot straighten out the mess, clear away the "tangled underbrush" of past judicial decisions, and put state taxation of non-resident businesses back into harmony with the Fourteenth Amendment and the commerce clause without firmly establishing by federal statute the basic principle already established, but often ignored by the courts, that a state may not consistently with due process, either by an apportionment formula or otherwise, impose at least as to non-resident businesses a tax upon or measured by transactions occurring or by property or other value including net income value situated beyond its own borders.

Such a federal statute should make it clear that with respect to the taxation of non-residents a state may look beyond its own borders only for the purpose of ascertaining the true value of things within the state and that neither an apportionment formula nor any jurisdictional "nexus" opens for taxation what is not within the state.

Under such a federal statute the usefulness of a compensating use tax could be practically eliminated by affirmatively *authorizing states, as a regulation of commerce and despite judicial decisions to the contrary, to impose a tax upon or measure a tax by retail sales made within the state* even though the sales contracts require shipment out of state. Under such a statute also the apportionment of net income, capital stock, net worth or other like value of non-resident businesses on a sales factor in which sales are allocated to destination, would be prohibited. Indeed, it probably should prohibit a sales factor entirely as not a proper measure of value at any particular place. A two-factor formula of (a) payroll representing labor and (b) property used both tangible and intangible representing capital (the two com-

9. 15 U.S.C.A. §§ 375-378. *Consumer Mail Order Assn.* v. *McGrath*, 94 F. Supp. 705 (1950).
10. 347 U. S. 340. 98 L. ed. 745. 74 S. Ct. 535. 3 STC Par. 200-111 (1954).

ponents of "value") would seem to merit most serious study as a *basic* formula to use when separate accounting is not feasible. Supporters of the allocation of sales to destination have demonstrated the fallacy of allocating sales elsewhere and destination falls of its own weight when examined closely.

Specific rules also should be established with respect to other phases of apportionment formulas, particularly to what states payroll should be allocated, and the extremely important question of the allocation of the true value of net income, capital stock, net worth, or other like value contributed by the home office and regional headquarters or management offices, as well as the interrelated question of intangibles, including working capital and investment and subsidiary capital and gross income therefrom. Such a federal statute should also establish principles under which allocation formulas, commonly called separate accounting, should be used as a more efficient method of allocating net income.

Conclusion

In this and the preceding article the author believes that he has scratched only the surface of state taxation of non-resident businesses with respect to extraterritorial value and transactions. An exhaustive research into all state tax practices which may be destructive of the federal system seems to be called for. Only Congress has the necessary means and objectivity to do a thorough job and the power to establish rules for determining what, if any, state taxation of extraterritorial value or transactions is permissible under the Federal Constitution. In any event it is time that Congress and the courts put to intelligent use in the interpretation, application and enforcement of the due process and commerce clauses the battle cry of the colonists, "taxation without representation". We once had the fortitude as a prelude to establishing our federal system to refuse to stand for such taxation. Surely we still have the fortitude intelligently to apply its principle to ourselves so far as applicable in order to preserve and improve that system.

The Printer of the Journal, the Editor, and the Architect struggling to make both ends meet at the turn of the century (1. John F. Cuneo, President, The Cuneo Press, Inc. 2. Tappan Gregory, Editor-in-Chief of the Journal. 3. John W. Root [hidden behind player pointed out by arrow] Holabird & Root, architects of the American Bar Center) in the annual classic between the University School and the Chicago Latin School played in Lincoln Park, Chicago, in 1903.

American Bar Association: Eighty-third Annual Meeting

First Announcement of Program, Washington, D. C., August 29-September 2, 1960

THE ASSEMBLY The Assembly sessions are scheduled to be held on Monday, August 29, at 9:00 A.M. in the Presidential Ballroom of The Statler Hilton*; Monday at 2:00 P. M. and Wednesday, August 31, at 10:00 A.M. in Sheraton Hall, of the Sheraton-Park Hotel; Thursday, September 1, at 2:00 P.M. in the Presidential Ballroom of The Statler Hilton. The Annual Dinner will be held simultaneously in the Presidential Ballroom, The Statler Hilton, and the Grand Ballroom of The Mayflower, Thursday at 7:30 P.M. The final Assembly session will be held on Friday, September 2, in the Presidential Ballroom of The Statler Hilton immediately following the adjournment of the House of Delegates.

HOUSE OF DELEGATES The House of Delegates will meet in the Presidential Ballroom of The Statler Hilton at 9:30 A.M. and 2:00 P.M. Tuesday, August 30; 2:00 P.M. Wednesday, August 31; 9:30 A.M. Thursday, September 1, and 9:30 A.M. Friday, September 2.

Administrative Law (Willard Hotel)

There will be a luncheon for the Council and Committee Chairmen on Saturday, August 27 at 12:00 M., followed by a meeting at 2:00 P.M. They will meet again on Sunday, August 28 at 10:00 A.M. and 2:00 P.M. General sessions of the Section will be held Monday, August 29 at 10:00 A.M. and Tuesday, August 30 at 10:00 A.M. and 2:00 P.M. A reception and buffet dinner is scheduled for Tuesday evening, August 30.

On Monday morning, Chief Judge E. Barrett Prettyman, of the United States Court of Appeals for the District of Columbia Circuit, will moderate a program on administrative law around the world. It is expected that ambassadors from a South American, a European, an Asian and an African country each will speak on administrative law in his country. Tom C. Clark, Associate Justice of the Supreme Court of the United States, will address the Section on Tuesday afternoon.

Antitrust Law (The Mayflower)

Three half-day sessions of the Section are scheduled for Monday, August 29, 9:30 A.M., and Tuesday, August 30, at 9:30 A.M. and 2:00 P.M. The annual luncheon will be held Tuesday at 12:30 P.M. The Council will meet with Committee Chairmen for breakfast on Wednesday, August 31, at 8:00 A.M. A joint symposium with the Section of International and Comparative Law is scheduled for Wednesday afternoon.

The Monday morning session will be devoted to the subject "Current Antitrust Developments". An all-day comprehensive symposium on the Robinson-Patman Act is being arranged by Professor Milton Handler for Tuesday. Rupert Leigh Sich, Registrar of Restrictive Trading Agreements in Great Britain, will address the Section at luncheon on Tuesday. "The Application of Foreign Antitrust Laws to an American Business Abroad" will be the subject presented at the joint symposium with the Section of International and Comparative Law on Wednesday afternoon.

Bar Activities (The Statler Hilton)

The Committee on Award of Merit will meet on Saturday and Sunday, August 27 and 28, at 10:00 A.M. each day. The Section will meet jointly for luncheon with the National Conference of Bar Presidents Saturday at 12:30 P.M. A Council breakfast meeting has been scheduled for Sunday at 8:00 A.M. A general session of the Section will be held Monday, August 29, at 9:30 A.M. A joint breakfast with the National Legal Aid and Defenders Association and the Committee on Legal Aid Work and the Committee on Lawyer Referral Service has been scheduled for Tuesday, August 30, at 8:00 A.M.

At the general session of the Section on Monday morning, two speakers will discuss law office management. One of the speakers will be Michael A. Bryceson, of London, England, who will talk on "Law Office Management in England". Sir Thomas Lund, the Secretary of The Law Society, will speak at the joint breakfast on Tuesday morning.

Corporation, Banking and Business Law (The Shoreham)

"Business and Government" will be the theme of various sessions of the Section of Corporation, Banking and Business Law and its committees beginning Friday, August 26, and ending Wednesday, August 31. Distinguished representatives of business and government are expected to

* This will be a business session of the Assembly from 9:00 to 10:00 A.M. to take care of nomination of Assembly Delegates, presentation of resolutions and other immediate business.

address the general Section meetings on Monday morning, August 29, and on Tuesday morning, noon and afternoon, August 30. The session on Tuesday afternoon will be held jointly with the Section of Public Utility Law and will be addressed by governmental, business and financial authorities on the subject of inflation. On that day a panel discussion on corporate law departments and their relation to members of the Bar will constitute the morning session and a distinguished member of the British Bar will speak at the luncheon meeting.

Monday evening, August 29, the Section will hold its first annual reception and dinner dance on the Terrace, or in case of inclement weather in the adjoining Terrace Banquet room. All members of the American Bar Association and their wives will be invited to attend.

The Committee on Savings and Loan Associations will have breakfast, luncheon and dinner meetings and a morning and afternoon meeting on Friday, August 26, with a breakfast and morning meeting on the following day to conclude its programs. The Committee on Corporate Laws will also have a morning, luncheon and an afternoon meeting on Friday. Meetings of other Committees are being planned and will be announced in the near future.

The Division of Food, Drug and Cosmetic Law will present programs at meetings scheduled for the morning and afternoon and at luncheon on Wednesday, August 31.

The Section's Council and Committee Chairmen will meet on the morning and afternoon of Sunday, August 28, with luncheon at 12:30 P.M. The Council will hold a business meeting on Tuesday afternoon.

Criminal Law (Willard Hotel)

General sessions of the Section have been scheduled for Monday, August 29, at 10:00 A.M., Tuesday, August 30, at 10:00 A.M. and 2:00 P.M., Wednesday, August 31, at 2:00 P.M.

A panel on "Alcoholism and Alcohol—Induced Offenses" moderated by Dr. Winfred Overholser, Superintendent of St. Elizabeth's Hospital, will be the subject for discussion at the Monday morning session. The subject for the Tuesday morning session is "Crime Portrayal in Public Media", with spokesmen for news and entertainment media, as well as a participant from the judiciary. It will be a panel discussion of effects of news coverage on various aspects of administration of justice and the influences, if any, of entertainment media and their portrayals of crime, criminals, law enforcement officers and lawyers. Tuesday afternoon the subject will be "Innovations in the Administration of Criminal Justice". This will be a discussion dealing with a few interesting developments such as pretrial in criminal cases, pre-sentencing investigations, and the indeterminate sentence. On Wednesday afternoon, the subject will be "Criminal Responsibility in International Law". This will be a discussion of the extent to which achieving and preserving peace in the world community depends on the development of individual—*i.e.*, criminal—standards of responsibility for offenses in the categories of crimes against humanity. In addition to the foregoing the Section is planning to sponsor a demonstration of police work by the Washington Metropolitan Department to be joined by other law enforcement agencies in this area.

Family Law (Manger Hamilton Hotel)

The Council will meet on Sunday, August 28, from 10:00 A.M. to 5:00 P.M. General sessions have been scheduled for Monday, August 29, at 10:00 A.M., Tuesday, August 30, at 10:00 A.M., 2:00 P.M. and 8:00 P.M. and Wednesday, August 31, at 2:00 P.M. The Section luncheon will be held Wednesday at 12:30 P.M.

The various committees of the Section will discuss problems of: Support, Paternity, Matrimonial Actions, Marriage Law, Practicing Lawyer, Juvenile Law and Procedures, The Judge, Adoption, Custody, and Membership. The Section also plans a divorce-case mock trial.

Insurance, Negligence and Compensation Law
(The Shoreham)

A reception and luncheon has been scheduled for the officers, Council members and Committee Chairmen on Sunday, August 28, at 12:00 M., to be followed by a meeting at 2:00 P.M. There will be a Section breakfast, Monday, August 29, at 7:30 A.M. A general session has been scheduled for Monday morning at 9:00 A.M. to be followed by the opening Section luncheon at 12:15 P.M. Various Committees of the Section will hold joint breakfast meetings on Tuesday, August 30, at 8:00 A.M. General sessions have been scheduled for Tuesday at 9:30 A.M. and 2:00 P.M. The annual reception will be held at 6:30 P.M. and the annual dinner dance at 7:30 P.M. on Tuesday evening. There will be a general Section luncheon Wednesday, August 31, at 12:30 P.M. A general session will be held on Thursday, September 1, at 9:30 A.M. to be followed by a reception and luncheon meeting of the Council and Committee Chairmen at 12:30 P.M.

The principal guest of honor this year will be United States Senator Harry F. Byrd who will address the Section luncheon Monday noon. In addition to a number of distinguished personages from the English and Canadian Bars, the speakers on various parts of the program will include such nationally recognized experts as Dr. Paul Dudley White, Dean Harold F. McNiece, Professor William J. Pierce, C. F. McErlean, Vice President of United Air Lines, Linton Godown and others. A new feature this year, subject to time limitations, will be numerous audience "question and answer" periods. Among several panels presenting opposing sides of interesting questions will be a discussion, pro and con, of the desirability of some sort of judicial control of contingent fees.

International and Comparative Law
(The Statler Hilton)

The Council will meet on Sunday, August 28, at 10:00 A.M. with a luncheon scheduled for 12:15 P.M. General sessions have been scheduled for Sunday, August 28, at 2:00 P.M. and Tuesday, August 30, at 9:30 A.M. A joint breakfast with the American Foreign Law Association and the Washington Foreign Law Society will be held Tuesday morning at 8:00 A.M. The luncheon scheduled for Tuesday at 12:15 P.M. will be held jointly with the Section of Judi-

cial Administration and the Junior Bar Conference. A special symposium on British Judicial Assistance with the British Institute of International and Comparative Law and the Section of Judicial Administration is scheduled for Tuesday at 2:15 P.M. A meeting of the new Council will be held on Tuesday, at 5:00 P.M. A reception in honor of the distinguished foreign guests is scheduled for Tuesday at 5:45 P.M. There will be a joint symposium with the Section of Antitrust Law on "The Application of Foreign Antitrust Laws to American Business Abroad" on Wednesday, August 31, at 2:00 P.M. The Section's Committee on Cooperation with the International Commission of Jurists will be held jointly with the British Section of the International Commission on Wednesday at 5:00 P.M.

The Tuesday luncheon will be addressed by the Right Honorable Lord Justice Pearce. The Special Symposium on British Judicial Assistance will consider topics of pretrial and interlocutory procedures such as service of process outside the jurisdiction and obtaining evidence abroad. Among the speakers will be B. A. Harwood, Master of Queen's Bench Division of the High Court of Justice, and the Right Honorable Lord Dunboyne.

Judicial Administration (Mayflower Hotel)

The National Conference of State Trial Judges will meet at 10:00 A.M. and 2:00 P.M. on Saturday and Sunday, August 27 and 28. Members of the Council of the Section will meet at luncheon on Sunday, August 28, at 12:30 P.M. with the Executive Committee of the National Conference of State Trial Judges. The Law and Layman Conference will meet at 9:00 A.M. on Monday, August 29. The Annual Banquet in Honor of the Judiciary of the United States will be held at the *Sheraton-Park Hotel* at 8:00 P.M. A demonstration of modern court procedures will be presented in the Ceremonial Court Room of the United States Courthouse at 10:00 A.M. on Tuesday, August 30. The Section will join with the Section of International and Comparative Law and the Junior Bar Conference at luncheon in The Statler Hilton on Tuesday, August 30, at 12:15 P.M. followed by an afternoon program on procedures in private international law. There will be a business meeting and report from State Chairmen on Wednesday, August 31, at 2:00 P.M. A luncheon meeting for the new officers and Council members is planned for Thursday, September 1, at 12:30 P.M. followed by an afternoon meeting of the Council.

The Right Honorable Lord Morris of Borth-y-Gest, Lord of Appeal in Ordinary, will participate in the Law and Layman Conference, Monday morning. The principal speaker at the Annual Banquet in Honor of the Judiciary of the United States on Monday evening will be the Right Honorable Lord Evershed, Master of the Rolls.

Junior Bar Conference (The Shoreham)

The judges of the Committee on Award of Achievement will meet on Thursday, Friday and Saturday, August 25, 26 and 27, at 9:00 A.M. each day. There will be a Board of Directors meeting on Friday, August 26, at 2:00 P.M. The Executive Council is scheduled to meet on Friday at 9:00 A.M. The Conference Assembly and first general session of the membership is scheduled for Friday at 2:00 P.M. There will be a reception on Friday at 6:00 P.M. A breakfast meeting will be held on Saturday, August 27, at 8:00 A.M. A Conference Assembly and second general session of the membership is scheduled for Saturday at 9:00 A.M. and 1:30 P.M. with an intervening Section luncheon at 12:00 M. District caucuses are scheduled for Saturday at 5:00 P.M. The reception at 7:00 P.M. and annual dinner dance at 8:00 P.M. are scheduled for Saturday. The Award of Achievement Workshop will be held on Sunday, August 28, at 10:00 A.M. to be followed by a Section luncheon at 12:00 M. The Nominating and Resolutions Committees are scheduled to meet at 2:00 P.M. that afternoon. The Conference Assembly and third general session of the membership will be held on Monday, August 29, at 9:00 A.M. The annual debate and reception sponsored by the Conference on Personal Finance Law will be held at 4:00 P.M. on Monday. The newly elected officers and Executive Council will meet on Tuesday at 9:00 A.M. There will be a joint luncheon with the Section of International and Comparative Law and the Section of Judicial Administration on Tuesday at 12:15 P.M. at *The Statler Hilton*.

Labor Relations Law (Sheraton-Park Hotel)

Council meetings are scheduled for Saturday and Sunday, August 27 and 28, at 10:00 A.M. each day in the Chairman's suite. General sessions will be held Monday, August 29, at 10:00 A.M. and Tuesday, August 30, at 10:00 A.M. and 2:00 P.M. There will be a Section luncheon Tuesday at 12:30 P.M.

Professor Otto Kahn Freund, of London University, noted authority on British labor law, will address the Section Monday morning. There will be a panel discussion on Tuesday morning, the panel to be composed of lawyers prominent in the field of labor relations law representing management and labor respectively. The subject will be "The Reform Act—One Year Later". A noted member of the judiciary will be the speaker at the Tuesday luncheon meeting. Tuesday afternoon, Professor Paul Hays, of Columbia Law School, Secretary of the Section of Labor Relations Law and a noted educator, will deliver a report on "Recent Supreme Court Decisions in the Field of Labor Relations Law".

Legal Education and Admissions to the Bar
joint sessions with
National Conference of Bar Examiners
(The Mayflower)

The Council will meet on Saturday and Sunday, August 27 and 28, at 10:00 A.M. and 2:00 P.M. each day. The Board of Managers of the National Conference of Bar Examiners will hold a breakfast meeting on Monday, August 29, at 8:00 A.M. The annual meeting of the Section has been scheduled for Monday at 10:30 A.M. The Section luncheon will be held on Monday at 11:45 A.M. There will be a joint session with the National Conference of Bar Examiners at 10:00 A.M. and a joint luncheon at 12:30

P.M. on **Tuesday, August 30.** A general session of the Section is scheduled for Tuesday at 2:00 P.M.

The luncheon scheduled for Monday noon will be addressed by Whitney North Seymour, President-Elect of the American Bar Association, and his subject will be "2000 A.D.—Will There Be a Legal Profession?" The Tuesday afternoon general session of the Section will be devoted to a panel discussion on "Do We Need a Legal Profession in 2000 A.D.? If So, What Must We Do Now?" The panel members will include William J. Jameson, United States District Judge for the District of Montana, who will discuss "The Interest of the Citizen", and Wilber M. Brucker, Secretary of the Army, who will speak on "The Interest of the Government". A third speaker to be announced will speak on "The Interest of Industry".

Mineral and Natural Resources Law

(The Sheraton-Carlton)

There will be a Council and Committee Chairmen meeting on Sunday, August 28, at 3:00 P.M. in the Chairman's suite. General sessions are scheduled for Monday, August 29, at 10:00 A.M. and Tuesday, August 30, at 9:30 A.M. and 2:00 P.M. There will be a Council breakfast meeting on Wednesday, August 31, at 8:00 A.M. and the new officers and Council members will meet Wednesday at 4:00 P.M. in the Chairman's suite.

The theme of this year's meeting of the Section will be: "Future Natural Resources of the World". The role of American industry and its lawyers in supplying fuel-deficient areas of Europe, Asia and Africa with its economic needs will be discussed. Members of the Section of International and Comparative Law will assist in presenting this part of the program. The second phase of the Section's program will be devoted to the presentation of papers on specialized topics.

Municipal Law (The Sheraton-Carlton)

The Council will meet on Saturday, August 27, at 3:00 P.M. General sessions of the Section are scheduled for Sunday, August 28, at 2:00 P.M.; Monday, August 29, at 10:00 A.M.; and Tuesday, August 30, at 10:00 A.M. and 2:00 P.M. There will be Council breakfast meetings on Monday and Tuesday at 8:00 A.M. each day. The new Council will meet on Tuesday at 4:30 P.M. The Section luncheon is scheduled for Tuesday at 12:30 P.M.

The Section will direct attention specifically to the increasing interest in urban development. Growing problems require a solid legal framework for the small growing cities as well as the overgrown large cities where urban renewal is vitally needed. One of the leading British authorities on urban planning, Desmond Heap, has accepted an invitation to speak on this important subject. It is contemplated that at the Monday morning session there will be a review of developments in the field of local government law and then a forum on such problems as incorporation, annexation, legislative standards and administration and jurisdictional problems under the general title of "Urban Growing Pains of Small Cities". The sessions on Tuesday will provide a forum on the legal aspects of urban renewal with prominent speakers presenting the federal, state and local approaches to the problem. This will be followed by a symposium on land use, planning and zoning and subdivision control. Other guest speakers will be Dudley Perkins, of London, England, and F. Joseph Cornish and Frederick G. Gardiner, both of Toronto, Canada.

Patent, Trademark and Copyright Law

(The Shoreham)

A meeting of the officers and Council members has been scheduled for Friday, August 26, at 9:30 A.M. and 2:00 P.M. with an intervening luncheon at 12:30 P.M. The officers will meet with the Committee Chairmen on Friday evening at 8:00 P.M. A copyright symposium will be held on Saturday, August 27, at 9:30 P.M. The United States Trademark Association luncheon has been scheduled for Saturday at 12:15 P.M. to be followed by a trademark symposium. The National Council of Patent Law Associations has scheduled a breakfast for Monday, August 29, at 8:00 A.M. The first business session of the Section will be held on Monday morning at 10:00 A.M. The second and third business sessions are scheduled for Tuesday, August 30, at 9:30 A.M. and 2:00 P.M. respectively. The International Patent and Trademark Association (A.I.P.P.I.) will hold a luncheon Tuesday at 12:30 P.M. The Annual Dinner of the Section is scheduled for Tuesday at 7:30 P.M. to be preceded by a reception and cocktail party at 6:30 P.M. There will be a Section luncheon on Wednesday, August 31, at 12:30 P.M. to be followed by the patent symposium at 2:00 P.M. The fourth business session is scheduled for Thursday, September 1, at 10:00 A.M. The new officers and Council will hold a luncheon meeting on Thursday at 12:30 P.M.

The Section will have an interesting program with panel discussions on a comparison of United States and British trial techniques in patent cases, business mergers and trademarks, the intent to use a trademark as the basis for registration application as permitted in Canada and Great Britain, and recent developments in a new copyright law. During the entire meeting time there will be an exhibit of "Progress in Industry Through Patents" in the lobby of the Department of Commerce Building. This exhibit will be open to the public and is put on by the United States Patent Office.

Public Utility Law (The Shoreham)

A Council meeting has been scheduled for Sunday, August 28, at 2:00 P.M. General sessions will be held on Monday, August 29, and Tuesday, August 30, at 10:00 A.M. each day. There will be a joint session with the Section of Corporation, Banking and Business Law, Tuesday at 2:00 P.M. A luncheon meeting for Council members and guest speakers has been scheduled for Tuesday at 12:30 P.M. Reception at 7:30 P.M. and Dinner Dance at 8:00 P.M. have been planned for Tuesday evening. There will be a breakfast meeting of the new officers and Council members, Wednesday at 9:00 A.M.

On Monday morning, a panel discussion dealing with

current regulatory problems will be the subject of this session. The respective chairmen of several of the federal agencies regulating utilities have accepted invitations to appear on this panel. The usual report of the Standing Committee on the developments of public utility law over the past twelve months' period will also be presented to the Section at this session by the Chairman of the Standing Committee, Horace P. Moulton, of New York. On Tuesday morning, R. A. Finn, Solicitor of the Central Electricity Authority of England, will speak on the subject of rate making and other regulatory aspects of British nationalized utility operations. The problem of primary jurisdiction resulting from antitrust enforcement policies as they apply to public utilities will be the subject of another speaker at this session. The subject of discussion at the joint session with the Section of Corporation, Banking and Business Law, Tuesday afternoon will be a panel discussion dealing with various aspects of the problem of inflation. James F. Oates, Jr., Chairman and President of The Equitable Life Assurance Society of the United States, has accepted an invitation to appear on this panel and it is expected that two other well-qualified speakers will join this panel.

Real Property, Probate and Trust Law
(Sheraton-Park Hotel)

A meeting of the Council has been scheduled for Saturday, August 27, at 2:00 P.M. in the Chairman's suite. The Council and Committee Chairmen will meet on Sunday, August 28, at 10:00 A.M. and 2:00 P.M. with an intervening luncheon at 12:00 M. A general session (Real Property Division) has been scheduled for Monday, August 29, at 9:30 A.M. The officers, members of the Council and Chairmen and members of Committees will hold a breakfast meeting on Tuesday, August 30, at 8:00 A.M. followed by a general session (Probate Law Division) at 9:30 A.M. A general session (Trust Law Division) is scheduled for Tuesday at 1:45 P.M. The annual reception and dinner are scheduled for Tuesday evening at 7:00 P.M. at the *Army and Navy Club*.

On Monday morning the Real Property Division will sponsor a talk by Professor W. Barton Leach, of Harvard Law School, on the effect of the Rule against Perpetuities on real estate transactions. Professor Leach's title will be "Let's Get the Rule on the Rails". In addition there will probably be a discussion of urban redevelopment projects with emphasis upon the use of deed restrictions to assure continued control. It is expected that a member of the British Bar will also discuss the subject "The Public Control of Land in England". The Probate Law Division will sponsor a discussion by Professor Bertel M. Sparks, of New York University Law School, on oral contracts to make wills. Present plans are to have an English solicitor or barrister discuss "Probate Practice in England". The program of the Trust Law Division scheduled for Tuesday afternoon will include reports by G. Van Velsor Wolf, Chairman of the Estate and Tax Planning Committee, William P. Cantwell and John R. Golden, Vice Chairmen of the Committee. Mr. Cantwell will report for his subcommittee on "The Effect of State Liens on Estate Planning". Mr. Golden will report for his subcommittee on "Perpetuating the Family Business Through Estate Planning". Henry R. Trimble, Secretary of International Business Machines Corporation, will speak on "Means of Executive Compensation—Corporate Considerations". In addition, it is expected that one of the English lawyers will address this session.

Taxation (Mayflower Hotel)

The officers and Council will meet in executive session on Thursday, August 25, at 9:00 A.M. and 2:00 P.M. There will be meetings of the Council and committee chairmen Friday, August 26, at 9:00 A.M. and 2:00 P.M. Business sessions will be held Saturday and Sunday, August 27 and 28, at 9:00 A.M. and 2:00 P.M. Section luncheons, to be addressed by Commissioner of Internal Revenue Dana Latham and Chief Counsel Hart Spiegel are scheduled for Saturday and Sunday at 1:00 P.M. There will be a reception at 7:30 and a dinner dance at 9:00 on Saturday evening in the spanking-new Cotillion Room at the *Sheraton-Park*. A final business session will be held Monday, August 29, at 9:00 A.M., followed by a technical session at 10:30 A.M. centering on a possible federal statute setting standards for state taxation of interstate commerce. Technical sessions are also scheduled Tuesday, August 30, at 9:00 A.M. and 2:00 P.M. The Tuesday morning meeting will demonstrate pretrial techniques in a federal district court tax case, with Federal District Judge Frank Van Dusen presiding. At the Tuesday afternoon technical session, current policies and practices of the national office of the Internal Revenue Service will be reviewed in the form of simulated cases presented to Assistant Commissioner (Technical) Harold T. Swartz, Tax Ruling Division Director John W. S. Littleton, and other officials of the Service.

Books for Lawyers

EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE. *By John MacArthur Maguire. Boston: Little, Brown and Company. 1959. $12.50. Pages 295.*

The author based this book on a unique and original concept, namely, in criminal cases the admissibility of evidence that has been obtained from the defendant. He divides his discussion into four distinct parts: privilege against self-incrimination; involuntary confessions; the McNabb-Mallory doctrine; and illegally obtained evidence, which in turn is further subdivided into two categories—evidence obtained by an illegal search and seizure and evidence obtained by wire tapping. The book is timely, dealing as it does with topics that have come to the fore in recent years and that have attracted a great deal of public attention. The author has carried out his task in a scholarly manner and has fortified his text continuously with helpful and exhaustive notes.

Involuntary confessions constitute perhaps the most important subject discussed by the author, since the rule excluding such confessions is not purely artificial, but is based on fundamental principles of abstract justice. To obtain a confession by physical or mental torture is abhorrent to civilized man. Moreover, such confessions are likely to be unreliable. The author is at his best in the chapter relating to this matter. His discussion is analytical and penetrating.

The privilege against self-incrimination is imbedded in the warp and woof of Anglo-American jurisprudence. Nevertheless, it cannot be deemed an integral part of natural justice, as is evidenced by the fact that Roman law countries do not recognize this right in the form in which we have it. While the book contains a detailed and exhaustive discussion of the authorities, the author misses an opportunity to include a history and a critique of the privilege. He also fails to refer to the question whether comment may be made to the jury on the failure of a defendant to take the witness stand and testify. This aspect of the general subject is worthy of consideration, since divergent rules prevail on this point in different jurisdictions. The doctrine that governs in the federal courts, as well as in the majority of the states, bars such comments and in fact accords to the defendant a right to have the jury instructed that no adverse inference may be drawn against him from his failure to testify. To what extent a trier of the facts can perform this difficult feat of mental gymnastics, which seems psychologically impossible, is perhaps debatable. In fact, as this reviewer has personally observed, many experienced criminal lawyers affirmatively request the court not to give this instruction for fear that it may emphasize a matter that the jury might otherwise overlook. The English courts, as well as the courts in a minority of the states, permit adverse comments to be made on the defendant's failure to testify.

In discussing the admissibility of evidence obtained by unlawful search and seizure, the author clearly shows that the federal rule of exclusion did not exist until 1914 and that it has not been accepted by a majority of the states. His discussion of this topic is lucid and illuminating.

The book devotes a separate chapter to what the author calls the McNabb-Mallory doctrine, which is a new, judge-made rule applicable only in the federal courts and which originated and has grown within the past twenty years. It seeks to penalize the prosecution if an arresting officer has not complied with the rule requiring a prisoner to be brought before a committing magistrate without unnecessary delay. The penalty in such cases is the exclusion of any confession, even if it be entirely voluntary, made during the period of undue delay. Manifestly the penalty is imposed on the public rather than on the officer, perhaps on the theory that a principal may be responsible for the acts of his agent. There have been a number of decisions in recent years by intermediate federal appellate courts on the question what constitutes or does not constitute unnecessary delay. It would have been helpful if the author had discussed some of these cases. These decisions lead to the conclusion that some interval between the arrest and the bringing of the prisoner before a committing magistrate is permissible, and that the rule does not require that the prisoner be conducted to a magistrate immediately upon being taken into custody.

ALEXANDER HOLTZOFF
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VATICAN DIPLOMACY. *A Study of Church and State on the International Plane. By Robert A. Graham, S.J. Princeton: Princeton University Press. 1959. $7.50. Pages 442.*

This scholarly and readable work by an erudite Jesuit of the California Province contains a complete index and bibliography and is the product of several years of research in Europe and America. It is not designed to be a popular, easily read treatise but is a useful and necessary reference book in every library that attempts to cover the fields of medieval and modern European history. It is not concerned with the question whether the United States would be well advised to maintain a minister or other diplomatic representative at the Vatican along with most of the other civilized nations, Protestant, Catholic and Islamic, nor does it deal with the exegetic elaborations with which the First Amendment of the United States Constitution, which declares merely and simply that *Congress* shall enact no law for an establishment of religion, has been embroidered by the United States Supreme Court.

Fundamental to the scheme of Father Graham's book is an exposition of the concept of Church and State as it moti-

vated diplomacy, both ecclesiastical and secular, from the beginning of Christianity. It would be difficult to have a clear understanding of medieval, or for that matter fairly recent, European history without a definite knowledge of the reciprocal pressures or conflicts of the secular governments and rulers and the Roman Catholic Church from the time (or even earlier) of Charlemagne, who set the Vatican's temporal power in the year 800.

Before the advent of Christianity, the religion of Rome and Greece and of the oriental monarchies was inseparable in popular concept from the civil authority. Religion was regarded as a province of the state. The gods were taken for granted and as new dominions were acquired, the religion of the new dominions was integrated with the old, with modifications, but the new and old religion was treated as an institution of the state. The idea of two separate sovereignties, civil and ecclesiastical, functioning within the same territorial jurisdiction, was not repugnant to the popular mind until fairly recent centuries. In England, for example, the clergy were governed by canon law and subject to ecclesiastical courts. There was one law for the ordinary subject and another for the "clerk" or cleric. Here and there, throughout the centuries, conflicts arose between kings or emperors and the Church, when the secular rulers claimed the right to nominate or appoint bishops and otherwise interfere in purely ecclesiastical affairs. Separation of Church and State was not contemplated by most of the reformers prior to the French Revolution who were rather concerned with merger of the Church with the State. Indeed, in several of the existing European Protestant nations, the bishops are today nominated by the king. But through the centuries the Vatican diplomacy has held to the view that the jurisdiction of the church in purely internal church affairs was paramount, though opinions as to what constituted church affairs varied from time to time. The Vatican position has always been that its diplomacy was not based on territorial sovereignty but was a spiritual authority over Catholics in every realm restricted however to church governance and matters of faith and morals. It rested its position on the saying of Christ, "Give unto Caesar the things that are Caesar's and to God the things that are God's." Father Graham says (page 390) "The Pope exercises the prerogatives of sovereignty *in his diplomacy* because his authority possesses the elements of independence that the State expects and supposes in those with whom it deals in its own diplomacy. In treating with the papacy at the diplomatic level the State here experiences a familiar echo of its relations with the other states. Why not describe this 'moral authority' with the only word that matches the reality?" Father Graham suggests "spiritural authority" as a term that can also be justified from the history of the struggle between Church and State. He sums up the existing situation (page 392) when he says, "Today's papal diplomacy has one simple objective: to maintain the liberty of the Church as a perfect society vis-à-vis that other perfect society whose own autonomy it recognizes whether Catholic or not". As Father Graham points out (pages 242-244) referring particularly to France, separation of Church and State is not inconsistent with maintaining diplomatic relations with the Vatican, but often leads to it.

It may not be inappropriate to suggest here that the Roman Catholic Church is the oldest existing organization of human beings in Christendom or elsewhere and (disregarding claims to divine guidance) it may be so because it is essentially democratic. The popes are selected as our Constitution originally intended Presidents to be, by a carefully chosen body of independent electors, intended to represent the foremost and sagest members of the organization to be governed, just as the Pope is selected by the College of Cardinals. As every private in Napoleon's armies is said to have carried a marshal's baton in his knapsack, so every simple parish priest is theoretically eligible for the triple crown. At all stages of history, popes have come from the lowest ranks of the peasantry or other commoners as well as from the highest levels of the patrician class. The only English Pope, Adrian IV, was a commoner named Nicholas Breakspear.

We cannot in this review cover the entire content of Father Graham's valuable book. It will be enough to have invited attention to its merits as a solid historical work and an incitement to other scholarly research by Jesuits of the California Province and others.

EUSTACE CULLINAN
San Francisco, California

THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE. *Edited by Clarence Morris. Philadelphia: University of Pennsylvania Press. 1959. $10.00. Pages 571.*

Clarence Morris, Professor of Law at the University of Pennsylvania, author of a valuable contribution to legal study called *How Lawyers Think*, has added an inviting compilation of selections from twenty-two legal philosophers, a study of which can immeasurably contribute to any lawyer's thinking as well as help train the all too few law school students of jurisprudence.

The representatives of the classical thinkers are Aristotle and Cicero, with Aquinas as the lone voice from Mediaeval days; Grotius, Hobbes, Locke, Montesquieu, Hume, Rousseau, Kant and Hegel make their entry in modern philosophy; and the nineteenth and twentieth centuries are represented by Bentham, Austin and Mill; von Ihering, Savigny, Ehrlich and Dabin from England and the Continent, and Holmes, Dewey, Pound and Cardozo from America. This is indeed an impressive list and the selections from each are well chosen.

But the carping critic is bound to raise his imperious voice and scream, "Where is there any recognition of the sterling works of Wilhelm von der Iceberg, the eleventh century Icelandic sage whose *Torts and Trifles* can not be omitted from any anthology that has scholarly pretensions?" The editor's prefactory anticipation of this charge is both charming and disarming. "A collector who leaves out Plato has at least put other omitted great legal philosophers in fine company."

There are two additional features which make this work attractive and

highly useful. There is a sprightly biographical note which introduces each thinker and there is a thirty-two-page three-column topical index which facilitates cross-reference for comparisons and contrasts. Imagine how any student, and that term includes a lawyer, can be assisted by 145 notations under the term "natural law" or 103 under "justice". A study of these pages can afford a good insight into the philosophic foundations of contemporary jurisprudence as they stem from the earlier thinkers from the days of Aristotle and Cicero to a recognition of the schools of juristic thought as they contend for acceptance today. We are now not without neo-Kantians and neo-Hegelians and the voice of Aquinas is re-echoed among the neo-Scholastics, such as Davin. Bentham and Mill are not without marked influence today and Austin still is looked upon as the sire of the analytic school; Savigny gives impetus to the historical school of von Ihering; Dewey and Holmes add a pragmatic touch to legal thought that found expression in some of the extremes of American realism here omitted. Pound and Cardozo bring up the significant rear with Sociological Jurisprudence. In all, there is much to be grappled with in this work drawn from many diverse points of view.

LESTER E. DENONN
New York, New York

THE PUBLIC'S CONCERN WITH THE FUEL MINERALS. *By Maurice H. Merrill. St. Louis: Thomas Law Book Company. 1960. $3.50. Pages 105.*

"The crucial battles of the law are fought in the chief areas of public concern."

On this premise, stated in the opening paragraph of his Edward G. Donley Memorial Lectures at the University of West Virginia. Professor Maurice H. Merrill examines the development of the fuel minerals as an area in which crucial battles have been fought. He does so in an interesting and scholarly fashion, compressing into 105 pages a remarkably comprehensive examination of the growth of the law in this field.

Professor Merrill has divided the history of the law's contribution to the growth of these industries into three eras, each of which was the subject of one of the lectures. The first deals with the foundation provided by the law for the early production of coal, oil and gas during the period that each might have been classed as an "infant industry". The following lecture examines the law as an instrument of public concern in policing the matured industries which evolved. Finally, the author discusses modern problems of these industries which have arisen during the past fifty years, many of which remain unsolved today.

The lectures are thoroughly indexed and voluminously footnoted. They provide a valuable quick reference guide for a lawyer seeking an entry into the authorities on almost any legal problem which has developed during the lifetime of these natural resource industries. As an introduction to the law of oil and gas and of hard minerals, the book would be especially valuable to the general practitioner, as well as to the student seeking a brief yet comprehensive review of the evolution of the law in these fields. Professor Merrill's perceptive analysis of the development of the law applicable to the fuel minerals results in a volume of much greater interest to the legal profession than its title might indicate.

Professor Merrill finds that the courts were predominant in providing the legal foundations for the fuel industries during their early days, and that legislature-made law dominated the era in which the law was dealing with mature industries. As in many other fields of law, the modern era, which includes the last fifty years, clearly shows the influence of the administrative tribunal as a major factor in the development of the law in the vital areas of public concern with which Professor Merrill is dealing.

The author has expressed apprehension that there may be "too much 'what', too little 'why' or 'how'" in the volume. One must be unduly critical to agree with him. It could be suggested, however, that in some instances he may have strained to see in changes in the law a reflection of the public's concern. Some of these developments, which Professor Merrill treats so effectively, could be attributed to the competition which exists within an industry itself and others to pressures generated by the industries from forces developing within them.

Perhaps in seeking to justify such instances, the author reminds us:

> We should not forget, of course, that there is a general public interest that mineral development shall be subject to rules not unduly restrictive and operating fairly upon all persons concerned.

The establishment of rules "not unduly restrictive" results far less frequently from expression of the public interest than from the pressure and influence of the industry itself. In our competitive society, which is predicated on the belief that the public interest is best served by the balance attained through the counter pressures of adversary interests, there is evidence that some of the developments which Professor Merrill ascribes to public concern in fact resulted from the demands of the industry. To so conclude detracts in no respect from the scholarly and valuable lectures delivered by Professor Merrill.

In his introduction to the lectures, Dean Roscoe Pound has epitomized the value and appeal of the volume in two statements:

> Both the science of law and the special law of fuel minerals are the better off by having them expounded and discussed by an author who is both a competent specialist and an all-around trained legal scholar. . .
>
> All this makes the book one for thoughtful lawyers, law teachers and students of justice in operation, no less than for specialized practitioners.

To that I would add only that general practitioners also, who have any contact with the law of the fuel mineral industries, will find the volume to be quite beneficial.

ROSS L. MALONE
Roswell, New Mexico

THE EAVESDROPPERS. *By Samuel Dash, Richard F. Schwartz and Robert E. Knowlton. New Brunswick: Rutgers University Press. 1959. $6.50. Pages 484.*

The subject of eavesdropping is everybody's business today. Modern

eavesdropping includes not only the wire-tapping of telephones but also eavesdropping by other, more disturbing electronic methods. This book, *The Eavesdroppers*, is an outgrowth of the fact that there is in America considerable awareness of eavesdropping, but most people have not had the facts of the situation available to them. The authors point out that the public is confused and is worried about reports of the more recent developments in the field of electronic eavesdropping. Eavesdropping today includes not only the use of informers, wire-tapping and bugging, but also hidden cameras, closed circuit television and two-way mirrors. The confusion as to legal regulation of wire-tapping which exists among the fifty states themselves is confounded by the conflict between state law and the federal law.

The Pennsylvania Bar Association Endowment undertook to sponsor a study of eavesdropping on a nationwide basis. The study covered wire-tapping practices, laws, devices and techniques both by state law enforcement officers, and the wire-tapping practices of big business, labor and politics. A distinguished committee supervised the study. Samuel Dash, the principal author of this book, is a former District Attorney. The states which were investigated in detail were Massachusetts, New York, Pennsylvania, Illinois, Louisiana, Nevada and California. The investigators concentrated on New York City, Boston, New Orleans, Baton Rouge, San Francisco, Los Angeles, Chicago, Philadelphia and Las Vegas. No attempt was made to cover the federal situation. A brief discussion of wire-tapping in England is included.

The authors point out that the most troublesome problem which they had was how to get the facts which they sought. Questionnaires proved to be utterly useless. The authors found out that in every state where police wire-tapping was prohibited, all police officials stated in their replies to the questionnaires that they never wire-tapped. In all states where police wire-tapping was permitted, police officials stated either that they never used wire-tapping or that they used it infrequently. *The Eavesdroppers* shows clearly that these answers were not in accord with the true facts.

The authors read everything that was reported in the *New York Times Index* on the subject from the year 1874 on. The *Index to Periodicals* was searched from 1930 to 1955 and all magazine articles referred to there were also reviewed. The committee finally decided to adopt the face-to-face interrogation technique. Most District Attorneys gave them a friendly reception, were helpful, and, more important, candid. In some cities, such as Chicago, the authors quickly learned that they were unwelcome. The principal interrogator was the author, Samuel Dash. He interviewed approximately 300 people in making up this study. Informants, if they wished, were permitted to keep their identity a secret. The factual report omits certain names and places, we are told, but the report is substantially complete.

The book is divided into three parts: first, a section dealing with the practice of wire-tapping and electronic eavesdropping; second, a section dealing with the tools used in eavesdropping; and third, a review of the present state and federal law applicable to eavesdropping. This makes an intelligent division of the subject.

The fact-finders reveal that the telephone lines of the White House were tapped in 1934 and 1935 and that prominent persons' telephones have been tapped. These persons have included the Mayor of Philadelphia, J. Pierpont Morgan, John W. Davis, Mayor O'Dwyer of New York City, and other high placed officials. In 1935 or 1936 the telephone lines of the Justices of the United States Supreme Court were tapped. This information was discovered by a Federal Communications Commission raiding squad. The temerity of the wire-tappers apparently knows no limits since they have included the United States Supreme Court and the White House.

The book's analysis of the development of the wire-tapping and eavesdropping law of New York State is particularly interesting. The authors conclude that the most active law enforcement wire-tappers in New York are the police (page 49). The authors conclude that between 2,000 and 3,400 wire-tap installations a year by the New York police is much more reasonable an estimate of the true situation than the 181 to 185 officially reported (page 51). This conclusion seems reasonable in the light of the evidence adduced. The opportunity for blackmail is tremendous in this field as the authors readily demonstrate.

The development of the law of New York will be particularly interesting to the lawyers since New York is one of the states where wire-tapping is permitted under judicial regulation, and there have been very recent amendments to its laws covering this field.

The authors report briefly on the wire-tapping situation in England and then develop in Part Two a serious study of the instruments used for wire-tapping. This will be of special interest to lawyers who have some engineering background. This part of the book illustrates the wide range of opportunity today eavesdroppers have to conduct secret surveillance on other persons without their knowledge.

The book also makes clear that it is possible to fabricate recordings (page 438). The conclusion which the authors come to that, "A person is bound at his peril to evaluate the reliability of those with whom he converses" (page 424), is clear from a reading of this book. A lawyer who represents a defendant charged with a crime would be very unwise under present-day circumstances to carry on extensive conversations with his accused client over his law office or home telephone. He also should be very careful about where he converses with his clients. The authors make it clear that the right of privacy does not exist so far as eavesdropping is concerned if one is suspected of criminal activity of any serious kind. The attitude of the Chicago police in not being eager to have any attempt made to legalize wire-tapping sums up the point. "They say that even if wire-tapping is illegal, they are going to tap anyway, and therefore can't see any reason to make it legal" (pages 221-22). There is something disturbing to lawyers about the position that law enforcement officers should be permitted to violate the very law that they are sworn to uphold. That is hypocrisy.

However, the duty of lawyers is to

reconcile order with liberty in this field and the task is not an easy one. One of the most important facts in this whole field is that Section 605 of the Federal Communications Act has become outmoded by scientific advances. Section 605 should be modernized to bring it into harmony with modern electronic developments. This book has purposely made no effort to collect or to present facts concerning federal law enforcement eavesdropping practices. It would be a great advantage if a similar factual study was made of federal law enforcement eavesdropping. Then an attempt could be made intelligently to reconcile the present conflict of laws on this subject. If federal and state officers must use eavesdropping techniques to meet effectively the threat of national and international crime, they should be permitted to eavesdrop without themselves violating the law. Certainly few citizens would deny them the right to wire-tap in the interests of national defense. When these overriding public interests affect the right to privacy beyond reasonable, legal limits, and what limitations should be imposed upon the admissibility of evidence in trials involving evidence obtained by eavesdropping, are matters which remain for future determination. The present situation is obviously chaotic and does not command the respect of clear-thinking lawyers. The author of *The Eavesdroppers* deserve special credit for having brought to this thorny subject intelligent thinking, objective fact-finding, and for giving the reader a logical and clear presentation of their facts. Lawyers will find this book of keen interest today.

EUGENE C. GERHART

Binghamton, New York

AN OUTLINE OF UNITED STATES PATENT LAW. *By Richard E. Brink, Donald C. Gipple and Harold Hughesdon. New York and London: Interscience Publishers. 1959. $7.50. Pages 280.*

Authors Brink and Gipple are practicing lawyers in the Patent Department, and Author Hughesdon is International Division Patent Manager, of Minnesota Mining and Manufacturing Company, of St. Paul, Minnesota.

This outline purports to be, as stated on the jacket, "A concise, practical and easily used reference and guide to the United States Patent system—for laymen and lawyers, scientists and technical men." The volume is clearly printed and well indexed, showing excellent workmanship by the publisher.

The first 106 pages are devoted to a so-called "Outline" and the remaining pages 107 to 280 are occupied by four appendices and an index. The outline, which is the only original feature of the work, purports to be a digest of the requirements of the statutory law, of the Patent Office Rules, and of the Manual of Patent Examining Procedure, with an occasional reference to U.S.C. Title 28, Judiciary, and U.S.C. Title 42, Atomic Energy.

The major part of the book, *i.e.*, about 155 pages, consists of a copy of the U. S. Patent Statutes, U.S.C. Title 35 and the Rules of Practice of the United States Patent Office in Patent Cases. The Manual of Patent Examining Procedure compiled by the Patent Office is not included, but is frequently referred to in the outline.

Now there are two kinds of patent law: The first kind has to do chiefly with the requirements and procedure governing the granting of patents, that is, it concerns mainly the granting of the patent and the ministerial acts involved in determination of the order in which inventions have been made. One might characterize this branch of the law as being concerned with creation of the property represented by the patent.

The second kind of patent law has to do with the patent as property, that is, conveyancing, licensing and enforcing the property rights inherent in the patent. The present volume, while it purports to cover the entire subject of U. S. Patent Law, that is, "obtaining a patent and enforcing the rights granted under it", actually is concerned chiefly with the former, that is, obtaining a patent.

The book makes no attempt to interpret the law or the requirements of the rules. Not a single citation of a judicial decision is included in the work. The authors were content merely to bring together, under a particular heading or subject, the requirements of the Statutes, of the Book of Rules and of the Manual. Thereby, as a joint index of the three controlling texts, it serves to alert the reader, who already has some familiarity with the subject, to the fact that there are provisions in each of the three reference texts bearing upon a particular subject.

The outline, as a correct statement of the requirements of the statutory law on patents and of the Patent Office Rules of Practice, which it purports to be, is unreliable.

The book fails to acquaint the reader with matters *in pais* or *ex contractu* that bear upon patent rights and their enforceability.

Neither does it refer to the special treatment of patent rights in connection with the tax law, which has become an important subject.

In common with all books attempting to spoon-feed a technical subject to the novice, this book gives the reader a false sense of knowledge of the subject-matter.

As a handy index, to the person who is already familiar with the rigidly enforced technical requirements of the Patent Statutes and the Rules of Practice, this little volume may have utility. For the reader not so skilled, each page should bear a legend such as—

> The reader should consult the actual text of the statute or rule, or the section of the Manual, and not rely upon the statement of this Outline.

JOHN A. DIENNER

Chicago, Illinois

RAGBAG OF LEGAL QUOTATIONS. *Compiled by M. Frances McNamara. Albany and New York: Matthew Bender & Company, Inc. 1960. $7.50. Pages 334.*

Breathes there a brief-writing lawyer who has not at some time read an epigrammatic sentence in an opinion,

and wished that he could retain it in memory for quoting at a proper time? But, unfortunately, memory often fails when most needed.

Who has not recalled the general tenor of a choice phrase, but not the precise language? And finding it would take more time than can be given to the search for one quotation.

Who has not wished that there were some place where quotations pertinent to the law and to lawyers were brought together and researchable as legal principles are in a digest?

Now the last has happened, and the first two frustrations need irritate the lawyer no longer—as to many familiar quotations in any event. And he can discover choice phrases, entirely new to him, to which no digest would lead him. A treasure trove of legal quotations has been collected by M. Frances McNamara, Lawyer-Librarian in the New York State Department of Law. From a phrase coined by Justice Holmes (see page 163 of the book), Miss McNamara calls her compilation *Ragbag of Legal Quotations*. But if "ragbag" suggests a confusion of odds and ends, this book is the antithesis of a ragbag. From whatever store in which she has deposited the gems over the years as she discovered them, Miss McNamara has now taken them, sorted them and put them into neat categories, for you to pick out "the piece and colour" (page 163 of the book) that you want.

Are you searching for graphic words to emphasize the far-reaching effect of libel? You can locate them—under the subject "Libel and Slander" at page 195 of the book—as written by Judge Cardozo in *Ostrowe* v. *Lee*, 256 N. Y. 36, 39:

> Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and "perpetuates the scandal."

On the question of intent, you have heard and read that "The state of a man's mind is as much a fact as the state of his digestion." But who said it? Now you can easily find that it was Lord Bowen (page 124 of the book, under the heading "Intent").

To bolster an argument for construction of a statute so as to accomplish the purpose to which it was directed, you can find, on page 126 of the book, an apt phrasing of the principle by Justice Jackson in *U. S.* ex rel. *Marcus* v. *Hess*, 317 U. S. 537, 557:

> If ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here.

If you are arguing that plaintiff in a negligence action was not "an invitee", you can, on page 131 of the book, find for support Justice Holmes' language in *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, 101:

> There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation.

Nor is this book of practical use to the lawyer only in his business. It is a source of sparkling material for speeches. There are delightful morsels such as "Oh, Sammy, Sammy, vy worn't there a alleybi", from Dickens' *Pickwick Papers;* such as a suggested item for a lawyer's bill: "To lying awake thinking of your case"; such as "Law is common sense as modified by the legislature."

They are all included: Marshall, Holmes, Cardozo, Learned Hand, Frankfurter, Warren, Coke, Bacon, the Bible and Shakespeare; and the priceless utterances of scholars and wits whose names are not remembered but whose words are.

As path finder to the quotations, the book supplies three routes: a classification by subject matter, consisting of nearly 300 subjects; an index of authors (with brief biographical notes); and a third index by words and phrases. Lawyers' tired eyes will be grateful for the clear, good size type; the well-spaced, uncrowded pages of the book.

Lawyers, particularly brief writers, speakers and just readers, will find this book of practical help, and entertaining browsing, for information and many a smile or even now and then a hearty laugh.

RUTH KESSLER TOCH

Albany, N. Y.

FEDERAL SOCIAL SECURITY—*A Guide to Law and Procedure. By Charles I. Schottland and Ewell T. Bartlett. Published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1959. $3.00. Pages 201.*

Lawyers and laymen alike will welcome this authoritative summary of the law and procedure relating to federal social security programs. Increasingly the general practitioner as well as those specializing in corporate and tax matters are confronted with questions related to social security. This volume attempts to present some of the answers, and it reduces the Government's expansive laws and regulations to a volume readily usable by the practitioner who may be called upon to advise clients on various aspects of social security problems.

This book on the technical details of the program is therefore a must for any lawyers' reference shelf or library. The book is detailed in its explanation of the claims process and especially the remedies of a claimant who is dissatisfied with his decision. The book is so prepared that it will serve both the purpose of a routine referral to the appropriate Social Security office or enable the lawyer to ascertain the particular question that may be involved and offer direct advice and representation.

An indication of increasing participation of practicing lawyers in social security claims work is found in the large number of administrative hearings held in connection with disallowed claims, as well as the increasing appeals to federal courts. The book contains information on how to secure approval of fees where the normal fee specified in the Regulations is found inadequate.

JOHN E. MULDER

Philadelphia, Pennsylvania

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Constitutional law . . . *civil rights*

United States v. *Raines*, 362 U. S. 17, 4 L. ed. 2d 524, 80 S. Ct. 519, 28 Law Week 4147. (No. 64, decided February 29, 1960.) *On appeal from the United States District Court for the Middle District of Georgia. Reversed.*

This decision upheld the constitutionality, at least as it applied to the facts in this case, of Section 131(c) of the Civil Rights Act of 1957. The statute authorizes the Attorney General to institute an action for injunctive relief to prevent racial discrimination in elections. It provides for intervention by the Attorney General "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege" guaranteed by the statute. The Attorney General had brought this action against the members of the Board of Registrars and certain Deputy Registrars of Terrell County, Georgia, alleging that they had, in the administration of their offices, discriminated against Negroes who desired to vote in elections. The District Court dismissed the action on the ground that the statutory language permitted the Federal Government to enjoin purely private action aimed at depriving Negroes of the ballot.

The Supreme Court reversed, speaking through Mr. Justice BRENNAN. The Court said that regardless of the validity of the statute if it were applied to private persons, the respondents here were clearly acting in their official capacities and thus their actions constituted the actions of the state itself. The Court cited the rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional". The Court suggested that some cases might present "countervailing considerations" which would call for a different rule, but went on to say that "This case is rather the most typical one for application" of the general rule. The Court refused to accept the argument that it was beyond the power of Congress to authorize the Government to bring an action in support of private constitutional rights, saying that "there is the highest public interest in the due observance of all constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief".

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN, wrote an opinion concurring in the judgment. This opinion took the position that the decision should have rested on the "weighty presumptive validity" accorded to every act of Congress.

The case was argued by Attorney General Rogers for the United States and by Charles J. Bloch for the appellees.

Constitutional law . . . *double jeopardy*

Forman v. *United States*, 361 U. S. 416, 4 L. ed. 2d 412, 80 S. Ct. 481, 28 Law Week 4122. (No. 43, decided February 23, 1960.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Affirmed.*

The petitioner and one Seijas were convicted of conspiracy to evade the individual income tax of Seijas and his wife. The case was submitted to the jury on a charge containing language similar to the charge in *Grunewald* v. *United States*, 353 U. S. 391 (1957), directing that the petitioner should be acquitted unless the jury found that there was a subsidiary conspiracy, continuing to within six years of the indictment, to conceal the attempt to evade taxes. The *Grunewald* decision disapproving a similar "subsidiary conspiracy" charge was handed down after this case was appealed and, on the strength of *Grunewald*, the Court of Appeals accordingly reversed and remanded with instructions to enter a judgment of acquittal. On rehearing, however, the Court of Appeals held that the case might have been tried on an alternative theory that certain of the acts charged in the indictment, which took place in 1948, 1951 and 1952, could well have been in furtherance of the conspiracy to evade taxes and not merely to further a conspiracy to conceal the evasion. The court modified its original order and entered another directing a new trial. Petitioner contended that this constituted double jeopardy.

The Supreme Court, speaking through Mr. Justice CLARK, affirmed. The Court said that there had been a "misconstruction" of the scope of the alleged conspiracy both here and in the *Grunewald* case. The indictment here charged a conspiracy to evade taxes from 1942 to 1945 and this conspiracy continued from 1942 through 1953, the Court said. The "subsidiary conspiracy" theory (to conceal the other conspiracy) had no place in the case, the Court went on, and the charge about it should not have been given.

As for the double jeopardy point, the Court declared that the double jeopardy rule had no application here. When one seeks a reversal of his conviction, the Court explained, "there is no double jeopardy upon a new trial". In rejecting the argument that the petitioner's right to acquittal "matured" when the Court of Appeals entered its first order, the Court said that "The original opinion was entirely inter-

Reviews in this issue by Rowland Young.

locutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing."

Mr. Justice HARLAN wrote a concurring opinion which expressed the view that the case had been submitted to the jury only on the subsidiary conspiracy theory and that the failure to include a continuing-conspiracy charge was an error in the Government's favor which it was not required to point out, especially since the *Grunewald* decision had not been handed down and the charge no doubt appeared correct to both parties.

Mr. Justice WHITTAKER also wrote a concurring opinion which argued that the petitioner had asked for and received a far more favorable charge than he was entitled to and could not be heard to attack it as prejudicial to him.

The case was argued by Solomon J. Bischoff for petitioner and by Abbott M. Sellers for respondent.

Constitutional law . . . *loitering*

Thompson v. *City of Louisville*, 362 U. S. 199, 4 L. ed. 2d 654, 80 S. Ct. 624, 28 Law Week 4193. (No. 59, decided March 21, 1960.) *On writ of certiorari to the Police Court of the City of Louisville, Kentucky. Reversed.*

In this rather unusual case, the petitioner was convicted of disorderly conduct and violation of a city ordinance against loitering after two Louisville police officers, on "a routine check" visited the cafe where he was waiting for a bus. When the police saw the petitioner "out there on the floor dancing by himself", they talked with the manager, then accosted the petitioner and asked why he was there. He replied that he was waiting for a bus. The police thereupon arrested him. According to the officer's testimony at the trial, the petitioner "was very argumentative—he argued with us back and forth and so then we placed a disorderly conduct charge on him". The evidence showed that the petitioner had given the police his home address, that he had money with him, that a bus to his home was scheduled to stop within half a block of the cafe, that he owned two unimproved lots and that he worked regularly. The manager testified that the petitioner frequently patronized the cafe and that he had never been told that he was unwelcome there. There was no evidence that anyone in the cafe had objected to the petitioner's conduct.

At the conclusion of the trial, the petitioner moved for dismissal of the charges on the ground that a conviction would deprive him of liberty and property without due process of law. The police court denied the motion and fined him $10 on each charge. Police court fines of less than $20 per charge are not appealable under Kentucky law, but a state court stayed the judgment so that petitioner could apply for certiorari to the Supreme Court.

The Supreme Court reversed in a unanimous opinion written by Mr. Justice BLACK. The Court said that the record was entirely lacking in evidence to support any of the charges and therefore the conviction could not stand. The testimony of the manager showed implied consent for the petitioner to be present in the cafe, the Court said, and the city conceded that that satisfied the loitering ordinance. "There simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there (in the ordinary sense of the words) without 'the consent of the owner or controller' of the cafe."

The only evidence of disorderly conduct, the Court went on, was the single statement of the policeman that petitioner was very argumentative after he was arrested and taken out of the cafe. Merely arguing with a policeman is not "disorderly conduct" as a matter of Kentucky law, the Court observed, and moreover, Kentucky law seems to provide that if a man wrongfully arrested fails to object to the arresting officer, he waives any right to complain later that the arrest was unlawful.

The case was argued by Louis Lusky for petitioner and by Herman E. Frick for respondents.

Constitutional law . . . *self-incrimination*

Nelson v. *County of Los Angeles*, 362 U. S. 1, 4 L. ed. 2d 494, 80 S. Ct. 527, 28 Law Week 4159. (No. 152, decided February 29, 1960.) *On writ of certiorari to the District Court of Appeal of California, Second Appellate District. Affirmed.*

This decision affirmed the firing by the county of two employees who refused to answer questions when they were subpoenaed by the House Un-American Activities Committee. The County Board of Supervisors had ordered the employees to answer any questions asked by the Committee about subversive activities, and a state statute made it the duty of any public employee to give testimony on such matters on pain of discharge "in the manner provided by law". One of the employees was a permanent social worker who requested and received a hearing by the state civil service commission which confirmed the firing. Here the judgment as to him was confirmed by an equally divided Court, and his case was not discussed. The other employee was a temporary worker in the same department who had received no hearing before the dismissal on the ground that he was not entitled to one under the county's civil service rules.

The opinion of the Supreme Court affirming the dismissals was written by Mr. Justice CLARK.

The petitioner contended that his summary discharge was arbitrary and unreasonable, and therefore a violation of due process. He also argued that the discharge was based on his invocation before the Un-American Activities Committee of his rights under the First and Fifth Amendments. The Court, however, pointed out that the state statute, as interpreted by the California courts, made it insubordination to refuse to answer questions of the nature put to the petitioner. The Court declared that the state did not rely upon any inference of guilt based upon the refusal to answer, which was condemned in *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), but rather upon respondent's insubordination for failure to give information

which the state had a legitimate interest in securing. The Court added that it was immaterial that the interrogation was by a federal body rather than by state authorities.

The CHIEF JUSTICE took no part in the consideration or decision of the case.

Mr. Justice BLACK, joined by Mr. Justice DOUGLAS, wrote a dissenting opinion which argued that the employees had been discharged only because they claimed their privilege under the Federal Constitution and that this was plainly a conflict between the California statute and the Federal Constitution.

Mr. Justice BRENNAN wrote a dissenting opinion in which Mr. Justice DOUGLAS also joined. This opinion argued that this case was indistinguishable from the *Slochower* case.

The case was argued by A. L. Wirin and Fred Okrand for petitioners and by William E. Lamoreaux for respondents.

Jurisdiction . . .
three-judge federal courts

Florida Lime and Avocado Growers, Inc. v. *Jacobsen*, 362 U. S. 73, 4 L. ed. 2d 568, 80 S. Ct. 568, 28 Law Week 4165. (No. 49, decided March 7, 1960.) *On appeal from the United States District Court for the Northern District of California. Reversed and remanded.*

This decision left judicially (and perhaps judiciously) unsettled a controversy over the respective merits of Florida versus California avocados.

The appellants, growers and packers of avocados in Florida, brought the suit for an injunction to prohibit the respondents, state officers of California, from enforcing a California statute that forbids the importation into California of avocados containing "less than 8 per cent of oil, by weight of the avocado, excluding the skin and the seed". The complaint alleged that avocados grown in Florida do not normally contain that much oil, that the Florida fruit was shipped in interstate commerce in full compliance with the Federal Agricultural Marketing Agreement Act of 1937 and an order of the Secretary of Agriculture, and that the California authorities had consistently barred the sale of the Florida-grown avocados in the West Coast state, forcing shipment of the fruit elsewhere and its sale in other states, all in violation of the commerce and equal protection clauses. Since a constitutional question was raised, appellants requested a hearing by a three-judge district court under 28 U.S.C. §2281. That court dismissed the action, however, on the ground that the appellants had not contested the validity of the California statute in the California courts and the complaint stated "no more than a mere prospect of interference posed by the bare existence of the law in question". When the case reached the Supreme Court, the appellees conceded that if the complaint had attacked the California statute solely on the ground of conflict with the Constitution, the action would have been a proper one for a three-judge court; however, they argued that since the complaint also attacked the validity of the statute on the ground of conflict with the Federal Agricultural Marketing Agreement, the action might have been decided on statutory rather than constitutional grounds, and the three-judge court should not have been convened. In the latter event, of course, the Supreme Court would have had no jurisdiction over a direct appeal.

Speaking for the Court, Mr. Justice WHITTAKER held that a three-judge district court was properly convened. The Court read Section 2281 as indicating a congressional intention to require an application for an injunction against enforcement of a state statute to be heard by a three-judge court in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. The Court reviewed the legislative history of Section 2281 to buttress this interpretation.

On the merits, the Court held that the District Court had been in error in holding that there was no "existing dispute as to legal rights" since the appellants had not contested the validity of the California statute in the courts of that state. The appellants had sent more than a score of avocado shipments to California, the Court said, and the state had consistently condemned the fruit, thus requiring the appellants to ship the fruit elsewhere to prevent spoilage and complete loss. "In these circumstances", the Court said, "the fact that appellants did not contest the validity of §792 nor seek abatement of appellees' condemnation of the avocados in the California state courts . . . does not constitute an impediment to their right to seek an injunction in the federal court . . ."

Mr. Justice DOUGLAS noted that he joined in that portion of the Court's opinion dealing with the merits although he disagreed that the case was a proper one for a three-judge district court.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which Mr. Justice DOUGLAS joined. The dissent took the position that the Court had no jurisdiction over the appeal because the case was not a proper one for a three-judge court. The dissent would have limited the jurisdiction of three-judge courts in cases of this nature to cases where the sole issue was the validity, under the Federal Constitution, of a state statute.

The case was argued by Isaac E. Ferguson for appellants and by John Fourt for appellees.

Labor law . . .
back wages

National Labor Relations Board v. *Deena Artware, Inc.*, 361 U. S. 398, 4 L. ed. 2d 400, 80 S. Ct. 441, 28 Law Week 4135. (No. 46, decided February 23, 1960.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed.*

This decision dealt with a small segment of the troubles of the respondent with sixty-six of its employees whom it had discharged for engaging in a strike. The National Labor Relations Board ordered reinstatement of the strikers with back pay. This order was affirmed as to sixty-two of the strikers by the Court of Appeals in 1952. In 1953, respondent offered reinstatement, but soon thereafter closed down permanently. The back wages were never paid.

In 1957, the Board moved the Court

of Appeals for discovery, inspection and depositions, naming the respondent, its president, one Weiner, and several other corporations, all of which were owned and controlled by Weiner. The Board alleged that Weiner had caused the assets of the respondent to be siphoned off through the other corporations to evade paying the back wages. The Court of Appeals ruled that a contempt proceeding was the proper remedy and denied the motion for discovery. A year later, the Board petitioned the court to hold Weiner and the various corporations in contempt and renewed its motion for discovery. The Board charged that the dealings among the companies showed both fraud and wrong-doing for the purpose of frustrating the back pay order and further that the various corporations were operated as a "single enterprise". The Court of Appeals held that the 1952 enforcement order had not made specific the amount of back wages owed and that the decree was therefore "not sufficiently definite and mandatory to serve as the basis for contempt proceedings".

On certiorari to the Supreme Court, Mr. Justice DOUGLAS reversed, speaking for the Court. The Court said that the Court of Appeals might have considered the transactions among the various corporations as if they were made between separate and distinct companies. "If they are viewed in that light", the Court went on, "we cannot say they are so colorable as to warrant us in reversing the Court of Appeals". However, the Court based its reversal on the ground that the Board was entitled to show that the separate corporations were in fact parts of a single enterprise—a theory that the Court of Appeals had not considered. The Court was careful not to intimate an opinion on the merits, saying that there would be time enough for that when it was determined that the corporations did in fact constitute a single enterprise.

Mr. Justice STEWART took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN, wrote an opinion concurring in the result. The view taken in this opinion was that the motion for contempt should have been sustained.

The case was argued by Ralph S. Spritzer for petitioner and by James G. Wheeler for respondents.

Labor law . . . *welfare funds*

Lewis v. *Benedict Coal Corporation, United Mine Workers of America* v. *Benedict Coal Corporation*, 361 U. S. 459, 4 L. ed. 2d 442, 80 S. Ct. 489, 28 Law Week 4105. (Nos. 18 and 19, decided February 23, 1960.) *On writs of certiorari to the United States Court of Appeals for the Sixth Circuit. Judgment in No. 18 modified; judgment in No. 19 affirmed by an evenly divided Court.*

The basic problem in this case was the right of a coal operator to withhold part of its royalty payments to the Mine Workers Welfare and Retirement Fund for damages for strikes and stoppages of work which it claimed were violations of the collective bargaining agreement setting up the fund.

The fund was set up in 1950 and each signatory operator agreed to pay into it a royalty of 30 cents a ton (later increased to 40 cents) for each ton of coal produced. Benedict's royalties between 1950 and 1953 amounted to $177,762.92, of which it paid $101,258.68, withholding the balance on the ground that its duty to pay was excused when the union violated the agreement by strikes and stoppages. Benedict also cross-claimed against the union for damages sustained by the strikes and stoppages. The jury found that the trustees were entitled to recover the full amount of the unpaid royalty and it gave Benedict a verdict of $81,017.64 against the union. The trial judge ordered that the sum collected from the union be paid into the registry of the court; execution on the trustees' judgment was delayed and was to be satisfied only out of the proceeds collected by Benedict on its judgment. The Court of Appeals affirmed except that it adjudged that the amount of Benedict's verdict was excessive and it remanded for a redetermination of that amount.

The opinion of the Supreme Court was delivered by Mr. Justice BRENNAN. Since the Court were evenly divided, the judgment that the union had violated the collective bargaining agreement was affirmed (No. 19), and the Court's treatment is confined to a discussion of the question presented in No. 18, whether Benedict could assert the union's breach of the agreement as a defense to the trustees' suit. Benedict argued that the set-off was proper because, in an amount equal to the amount of the damages it sustained from the strike and stoppages, no fund property came into existence under the terms of the agreement; it cited the clauses in the agreement which provided that "This Agreement is an integrated instrument and its respective provisions are interdependent" and that the no-strike clauses are "part of the consideration of this contract". The Court, however, refused to say that the union's performance of its promises was a condition precedent to Benedict's duty to pay the royalty. The trustees, the third-party beneficiary of the agreement, had breached no duty to the promisor, the Court said, and it refused to infer a provision from the agreement that the promisor might protect himself by a "set-off". This was not the usual third-party beneficiary contract, the Court said, but an industry-wide agreement covering many promisors. Moreover, the royalty payments in a sense were compensation to the employees, similar to wages, and yet no one would contend that Benedict might set-off its damages by withholding wages. Finally, the Court declared, Section 301(b) of the Taft-Hartley Act provides that money judgments against a union shall be enforceable only against the organization as an entity, a congressional expression of national labor policy. The Court said that parties to collective bargaining agreements must express their meaning in unequivocal language before it would hold that the union's breaches of its promises gave rise to a defense against the employer's duty to contribute to a welfare fund.

Mr. Justice STEWART took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a dissenting opinion which argued that the Court admitted that if the bargaining agreement were a "typical third-

party beneficiary contract", then Benedict could withhold the amount which was owing it for the breach of the union's undertaking. The dissent protested against treating "collective bargaining agreements as a "very special class of voluntary agreements to which the general law pertaining to the construction and enforcement of contracts is not relevant".

The cases were argued by Russell R. Kramer and M. E. Boiarsky for petitioners and by Robert T. Winston, Jr., for respondent.

Tariff . . .
marking imported articles

United States v. *Mersky*, 361 U. S. 431, 4 L. ed. 2d 423, 80 S. Ct. 459, 28 Law Week 4126. (No. 31, decided February 23, 1960.) *On appeal from the United States District Court for the Southern District of New York. Affirmed.*

The appellees were charged on an information with removing the original labels from ten violins imported from the Soviet Occupied Zone of Germany. The Government contended that this was a violation of Section 1304 of the Tariff Act of 1930 which requires that imported articles be marked to indicate to the ultimate purchaser the English name of the country of origin. The appellees had replaced the labels "Germany/USSR Occupied" with labels reading simply "Made in Germany". A Treasury Regulation provided that products of West Germany should be marked to indicate Germany as the country of origin and products of the Soviet Zone should be marked to indicate "Germany (Soviet Occupied)" as the "country" of origin. The District Court dismissed the information, concluding that the purpose of the regulation was solely to aid in identifying the products of Soviet Occupied Germany because of the differences in tariff rates between goods imported from West Germany and goods imported from the Soviet sector. On appeal, the Court of Appeals held that the District Court's opinion interpreting the regulation was tantamount to a construction of the statute, and hence, under the Criminal Appeals Act, the dismissal was appealable directly to the Supreme Court. It also held that the effect of the dismissal was to sustain a motion in bar, which, under the Criminal Appeals Act, also required direct appeal to the Supreme Court. The Court of Appeals therefore certified the case to the Supreme Court.

The Court's opinion was delivered by Mr. Justice CLARK. The Court turned first to the jurisdictional question. Section 3731 of the Criminal Appeals Act requires a direct appeal to the Supreme Court "From a decision . . . dismissing any indictment or information . . . where such decision . . . is based upon the invalidity or construction of the statute upon which the indictment or information is founded". The section goes on to provide for a direct appeal to the Supreme Court "From a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy". The Court said that the direct appeal was proper here because construction of the regulation necessarily was an interpretation of the statute. The statute and the regulation were "inextricably intertwined" the Court said, so the dismissal of the information amounted to construing the statute.

On the merits, the Court agreed with the District Court that the regulation was not aimed at the protection of the ultimate purchaser, but rather dealt with "tariff status" and "customs valuation", the marking requirement being merely an aid thereof.

Mr. Justice BRENNAN wrote a concurring opinion which undertook to answer the argument of the dissenters that the dismissal by the District Court was not one "sustaining a motion in bar, when the defendant has not been put in jeopardy". The opinion said that the dissenters were attempting to resurrect technicalities that were foreign to the modern rules of criminal procedure.

Mr. Justice WHITTAKER noted that he agreed with the dissents that the term "statute" as used in the Criminal Appeals Act did not include "regulations" but agreed with Mr. Justice BRENNAN that the dismissal was one sustaining a motion in bar so that the Court had jurisdiction.

Mr. Justice FRANKFURTER, joined by Mr. Justice HARLAN and Mr. Justice STEWART, wrote a dissenting opinion which canvassed the legislative history of the Criminal Appeals Act and concluded that a "regulation" was not a "statute" within the meaning of that act.

Mr. Justice STEWART wrote a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice HARLAN joined. This opinion argued that the Supreme Court had no direct appellate jurisdiction because the dismissal of the information was based not upon the invalidity of a statute but only on the invalidity of a regulation. Nor did the Court have jurisdiction on the ground that the dismissal was a judgment "sustaining a motion in bar" the dissent said, because a "motion in bar" was equivalent to the common law "special plea in bar", and this was not a technical special plea in bar.

The case was argued by Eugene L. Grimm for appellant and by Julius L. Schapira for appellees.

What's New in the Law

The current product of courts, departments and agencies

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Actions . . .
husband-wife actions

A widow has no right of action against her deceased husband's estate for a tort committed during coverture, the Supreme Court of Illinois has ruled. The decision is based on an Illinois statute which the Court construed as reinstating the common-law rule that it had discarded in a former case.

In arriving at its holding the Court noted the old common law doctrine that a wife had no right of action against her husband, either in tort or contract, and then referred to the Illinois Married Women's Act, which was enacted in 1874. In *Brandt* v. *Keller*, 413 Ill. 503, decided in 1952, the Illinois Court ruled that the statute removed the common law disability and permitted a wife to maintain a tort action. Following this the Illinois legislature in 1953 added a proviso to the statute that "neither husband nor wife may sue the other for a tort to the person committed during coverture".

Faced with the present statute, the plaintiff contended that it did not preclude actions after coverture has ended by death, or, alternatively, that the 1953 amendment was unconstitutional. The Court turned down both arguments.

The Court read the statute as precluding a cause of action from coming into being during the marriage and that, therefore, there was nothing to survive the husband's death. It refused to conclude that the statute merely created a disability to bring the action during coverture, declaring: "We find nothing in the language of the proviso to justify the anomalous conclusion that the existence of a cause of action between husband and wife is entirely dependent on the fortuitous event of the death of the spouse."

One of the plaintiff's constitutional arguments was based on a provision of the Illinois Constitution that "[e]very person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation". The Court answered that "this policy expression does not authorize us to create a cause of action unknown to the common law in the face of an express statutory prohibition".

The other constitutional contention was that the 1953 proviso violated the due process clauses of either the state or federal constitutions. The Court termed the 1953 amendment a non-arbitrary determination of public policy to return to the common law doctrine, and it concluded that since the legislature had the power in 1874 to grant married women the same right to maintain actions as unmarried women, so it had the power in 1953 to withdraw that right partially.

(*Heckendorn* v. *First National Bank of Ottawa*, Supreme Court of Illinois, March 31, 1960. Davis, J.)

Actions . . .
wife's loss of consortium

Over the protest of three of its judges, the Supreme Court of Michigan has joined the handful of jurisdictions granting a cause of action to a wife for loss of her husband's consortium. The Court declared that the reasons that may have existed at one time to support denial of the action to a wife have now disappeared and that to follow the reasoning of courts that still deny the action "leads to a dead end of reasoning and logic".

The Court defined consortium as conjugal fellowship, which, it said, could not be divided into component parts. For this reason, it continued, there was no substance to the objection that a wife cannot maintain the action because, since she holds a subservient position, she cannot allege the loss of material services. "The fact of the matter is that there is no predominant element in the concept of consortium," the Court declared, "that consortium is not capable of subdivision, and that it is not necessary that there be an allegation of the loss of any particular 'element' thereof."

The Court also rejected the notion that the married women's acts have the effect of denying the husband's common-law action for loss of consortium, rather than enlarging it to include the wife. "The point is", the Court said, "that the underlying concept of the early common law, the inferiority of the wife, has been repudiated, and the question for decision is not whether such a right existed then but whether it exists today."

Having answered the grounds for denying the action, the Court conceded that it was faced with the problem of sound judicial policy, but it declared that since the obstacles to the wife's action were "judge-invented" they should be "judge-destroyed". It noted that the law has extended its protection to several areas "once thought too obscure for recognition, to rights once thought too vague, too ephemeral, too intangible to be capable of legal measurement."

The three dissenters pointed out that Michigan has never recognized the right of either spouse to an action for loss of consortium. They noted that the leading case permitting recovery by a wife—the Court of Appeals for the District of Columbia's decision in *Hitaffer* v. *Argonne Company*, 183 F. 2d 811—has been rejected as well as followed by later decisions. It concluded that any change in the estab-

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

lished Michigan rule should come, if at all, from the legislature.

(*Montgomery* v. *Stephen*, Supreme Court of Michigan, February 25, 1960, Smith, J., 101 N.W. 2d 277.)

Attorneys . . .
attorney-client privilege

The attorney-client relationship does not bar an attorney from disclosing the identity of the person who retained him and who paid his fee, the Supreme Court of New Jersey has ruled.

The point arose in a contempt proceeding against a lawyer who had refused, under the cloak of the attorney-client privilege, to tell the New Jersey State Civil Service Commission whether a third party had paid his fee for defending a highway department material inspector against charges of violating the Hatch Act. The highway department employee was before the Commission on charges that he permitted or requested contractors and suppliers doing business with the highway department to collect and pay his attorney's fees in the Hatch Act proceeding. The reticent attorney was the general counsel of a sand and gravel company, whose products were sold to the state and were subject to inspection by the highway department employee involved. It was a matter of record that the attorney had represented the state employee in the Hatch Act case, but he refused to say who paid his fee.

The Court decided that New Jersey law exempts the identity of the client and the fee from the things protected from disclosure by the attorney-client relationship. The Court declared, moreover, that the information might well be subject to disclosure under the authorities which decline to extend the attorney-client privilege to communications from third parties, if, in fact, a third party did retain the attorney and pay his fee. And, the Court added, if the third party were a contractor or supplier doing business with the highway department, the payment of the fee would be participation in wrongful conduct that courts might refuse to protect against disclosure because of public policy considerations.

"Throughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure", the Court declared. "When that principle conflicts with the attorney-client privilege it must, of course, give way but only to the extent necessary to vindicate the privilege and its underlying purposes. . . [W]e are satisfied that [disclosure may be had in this case] within the precedents and without impairing the general effectiveness of the privilege in affording to clients a proper measure of freedom from apprehension in consulting their legal advisers."

(*In re Richardson*, Supreme Court of New Jersey, January 25, 1960, Jacobs, J., 157 A. 2d 695.)

Attorneys . . .
refusal to answer

A New York lawyer has been disbarred for his refusal to answer questions during a judicial inquiry into solicitation of negligence cases in Kings County. The Appellate Division, Second Department, was careful to place its decision on the lawyer's flouting of his duty as an officer of the court to assist the inquiry, rather than on his refusal to answer questions, which was based on his constitutional privilege against self-incrimination.

The respondent had been called before a judge appointed by the Appellate Division, Second Department, to conduct the inquiry, which had been ordered in response to a petition from the Brooklyn Bar Association stating that serious abuses existed in obtaining retainers in contingent-fee negligence cases. In New York, the four Appellate Divisions exercise professional discipline jurisdiction over the Bar under constitutional and legislative provisions. The respondent was subpoenaed to testify and produce his records concerning 304 cases in which he had filed retainer statements from 1954 to 1958, inclusive. He refused, invoking his constitutional privilege, to do either. The present disbarment proceeding resulted.

The Court rejected the respondent's contention that the proceeding was for the purpose of disciplining him because he used his constitutional right not to testify to matters that might tend to incriminate him. That contention, the Court declared, "overlooks the undeniable fact that respondent, with respect to his rights as a citizen and with respect to his obligations as a lawyer, stands in a dual position". It emphasized that he had a complete right to exercise any constitutional privilege, that no inference of guilt or misconduct was inferable from the refusal and that he could not be disbarred "for his assertion in good faith of his constitutional privilege". But, the Court continued, the basis for its action was the "fact that [the respondent] has deliberately refused to cooperate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether [the respondent] had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar".

The Court emphasized that the right to practice law is, to use Cardozo's expression, "a privilege burdened with conditions". It placed the disbarment on the ground that the respondent had broken one of the "conditions" and thereby lost the "privilege". The Court declared:

> . . . If, as it has been often held, disbarment is not criminal punishment, then by asserting his constitutional privilege against self-incrimination and thus gaining immunity from criminal prosecution or *punishment*, is the respondent free to flout and destroy the basic relationship between the lawyer and the court? Can he, with impunity, disregard the canons of ethics and cast to the winds all inquiries into his professional conduct as a lawyer? Can he disregard his obligation to be frank and candid with the court? Can he negate his duty to cooperate with this court to expose the evil and unethical practices at the Bar and in the courts? Can he refuse to assist this court in its quest to maintain the integrity and morality of the members of the Bar and to maintain the high standards of the legal profession? We say, emphatically no.

The Court's order struck the respondent's name from the roll of attor-

neys, but gave him leave to apply for vacation of the order within thirty days on proof that he had answered the questions and produced the documents.

One judge dissented. He contended that "[d]espite all disclaimers to the contrary, the respondent is being disbarred for pleading his privilege against self-incrimination."

(*In re Cohen*, New York Supreme Court, Appellate Division, Second Department, December 31, 1959, Beldock, J., 195 N.Y.S. 2d 990.)

Criminal Law . . . *federal-state balance*

The Court of Appeals for the Seventh Circuit agrees that the federal courts have supervisory power over federal law enforcement agencies, but it has refused to extend that power to enjoin testimony of federal narcotics agents in a state court criminal trial and to impound evidence to be presented there.

The suit claimed that narcotic drugs were taken from the petitioner's person during an arrest and search without a warrant by federal narcotics agents, who were made defendants. The petitioner was indicted by an Illinois grand jury for unlawful possession of narcotic drugs and a state court denied his motion for suppression of the drugs obtained in the search. The petitioner, awaiting state trial, sought a declaratory judgment that the arrest and search were illegal and, upon that determination, an order impounding the drugs and restraining the agents from testifying in the state trial.

The Seventh Circuit, affirming the District Court, found no merit in the petitioner's contention and dismissed the suit. It held that the power to supervise federal law enforcement agencies arises only when those agencies are acting pursuant to federal process or orders of federal courts, and that the power cannot be used where, as here, there is no federal action whatever and the tainted evidence is not in hands of a federal officer or court. The federal courts' supervisory power, the Court continued, "commands the exclusion as evidence of the fruits of invasions of federal constitutional immunities against unlawful detention and unreasonable searches and seizures", but the sanctions do not have constitutional stature. Therefore, the court said, the sanctions are limited by the bounds of the federal judiciary supervisory power and can be used only against federal courts and law enforcement agents acting pursuant to federal judicial authority. Referring to policy considerations in balancing federal-state interests, the Court declared that *Rea* v. *U. S.*, 350 U. S. 214, does not mean that the federal judiciary should assume supervisory jurisdiction over all activities of federal law enforcement authorities. "There are other traditional remedies to protect federal constitutional rights", it added.

Considerations of policy would constrain the denial of the petitioner's prayer even if power existed, the Court said. It based this belief on the Narcotic Control Act of 1956, which charges the Secretary of the Treasury to join with the states in the suppression of drug traffic, and on other legislation showing a concern for law enforcement in the narcotics field. "Intervention at this posture of the state case, in effect, would result in granting a federal review of an interlocutory state court order", the Court said.

(*Wilson* v. *Schnettler*, United States Court of Appeals, Seventh Circuit, March 21, 1960, Grubb, J.)

Federal Jurisdiction . . . *abstention doctrine*

Although it was told by the Court of Appeals for the Fifth Circuit to hear the case, a three-judge United States District Court for the Eastern District of Louisiana has stayed further proceedings in a case challenging the constitutionality of a Louisiana statute. The District Court believed that Supreme Court cases since the Fifth Circuit decision have clarified the principles of federal abstention and have "perhaps extended them beyond the limits which some of us thought prevailed". The Court concluded that the doctrine of abstention compelled it to stay the case until the state courts have a chance to interpret the statute.

The case is one brought by forty chiropractors against the Louisiana State Board of Medical Examiners to have the Louisiana Medical Practice Act declared unconstitutional as applied to them. What bothers the chiropractors is that they can't get a license without a standard medical education. The District Court first dismissed the suit, but the Fifth Circuit reversed, saying the plaintiffs "are entitled to an opportunity to attempt to prove that chiropractic is such a useful profession or calling that they cannot be constitutionally excluded from its practice", as they are by the legislation and the Board. But it took the Fifth Circuit two opinions to nail this down. 259 F. 2d 626 (44 A.B.A.J. 1085; November, 1958) and 263 F. 2d 661 (45 A.B.A.J. 288; March, 1959).

Looking at recent Supreme Court expressions, the District Court on the remand pointed out that in *Martin* v. *Creasy*, 360 U. S. 219, both the majority and the concurring minority agreed that federal courts should abstain from decisions involving the constitutionality of a state statute, at least to avoid a premature and perhaps unnecessary federal constitutional question or to avoid unsettling the delicate balance of federal-state relationships. Even on these two narrow grounds, the Court said, the present case was one for abstention. It noted that the state courts could change their interpretation of the statute or hold that chiropractors are not governed by the statute. "The answer of the state court cannot be presumed one way or the other", the Court said. "It is appropriate that this Court stay its hand until the state has had a chance to act."

(*England* v. *Louisiana State Board of Medical Examiners*, United States District Court, Eastern District of Louisiana, January 5, 1960, Jones, J., 180 F. Supp. 121.)

Segregation . . . *submission of plan*

The Dallas public school system must come in with a plan to end racial segregation in its schools, the Court of Appeals for the Fifth Circuit has ruled in modifying a District Court decision that refused to order immediate desegregation. One judge dissented.

The basic District Court order involved in the case, entered in April,

1958, enjoins segregation "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed". In May, 1959, the plaintiffs sought further relief. They alleged that Dallas schools were still being operated as before and they asked for immediate compliance with the injunction to desegregate. Upon hearing, however, it appeared that the date the plaintiffs wanted fixed for compliance was September, 1960. In a long oral statement the District Judge told the school board to "put your house in order for integration, for it is ahead of you", but he refused to set a date. His order denied immediate desegregation, but retained jurisdiction and recessed the hearing until April 1, 1960.

The Fifth Circuit agreed that the District Court properly turned down the immediate desegregation plea, but it declared the order "should have required the defendants to submit a plan for effectuating a transition to a racially non-discriminatory school system . . ." The Court then appended its own requirement that a plan be submitted within thirty days of the date its judgment became final, and that the District Court hold a hearing on the plan within thirty days after that.

(*Boson* v. *Rippy*, United States Court of Appeals, Fifth Circuit, March 11, 1960, *per curiam*.)

On another segregation front—public recreational facilities—the sale by Greensboro, North Carolina, of its municipal swimming pool to a private corporation, which has continued racial segregation, has withstood an attack in the Court of Appeals for the Fourth Circuit.

When the sale was first proposed a group of Negroes sought an injunction, which was denied, but they were given thirty days after the proposed sale to show that it was not bona fide "in the sense that there was collusion between the defendants and the successful bidder regarding the future use of the pool". 162 F. Supp. 549 (44 A.B.A.J. 983, October, 1958). Following the sale the District Court, after a hearing, concluded that the plaintiffs had not shown that the sale was not bona fide. 175 F. Supp. 476.

The city conceded that it may not constitutionally operate a racially segregated public facility, and the plaintiffs conceded that the city could cease to operate the swimming pool. What the plaintiffs did contend was that there was collusion between the city and the high bidder for the pool and that the whole scheme was nothing more than a way for the city to continue unlawful segregation.

The main fact on which they relied to support this was that a man instrumental in organizing the private corporation was also a member of the city's Parks and Recreation Commission. The Court pointed out, however, that a member of the Commission has only an advisory relation to the city and is not a member of the city council, the legal governing body of the city. This was an insufficient ground on which to invalidate the sale, the Court decided.

The Court concluded that it could not say that the District Court's finding that there was no agreement between the city and the corporation relating to the future ownership, use or operation of the pool was clearly erroneous. The plaintiffs would be entitled to an injunction, however, the Court added, if "it should appear at any time hereafter that the city openly or secretly assists in the operation of this racially restricted pool by any form of subvention or other favorable treatment."

(*Tonkins* v. *City of Greensboro*, United States Court of Appeals, Fourth Circuit, March 14, 1960, *per curiam*.)

Trade Regulation . . .
abridgments and re-titles

With one judge concurring reluctantly, the Court of Appeals for the Second Circuit has ordered enforcement against a paper-back book publisher of a Federal Trade Commission order requiring books that have been abridged or re-titled to be so marked in "clear and conspicuous type". The Court reached this conclusion despite finding that the publisher's books bore such identifying legends, which it conceded were legible.

The Commission found that the publisher had engaged in "unfair or deceptive acts or practices in commerce" prohibited by §5(a) of the Federal Trade Commission Act, 15 U.S.C.A. §45(a). This was based on the trial examiner's conclusion from looking at the books in question that "many buyers would not glean the fact that some of these books had previously been published under different titles, or were abridgments", although all such books were so marked on the cover and in some cases on inside pages in addition. The only testimony at the hearing was that of a psychologist presented by the publisher. He told about the buying habits of paper-back book buyers, as based on 1,400 interviews.

The Commission disregarded the testimony of the publisher's witness and the Second Circuit agreed that the Commission was not bound to accept it. The Court said the trial examiner was free to use his own judgment and impression of how intently a prospective purchaser will examine a paper-back. It said the Commission was free to determine for itself whether its mantle of protection in the public interest should extend to the two-minute riffler, and not simply to the average "four-minute buyer or the careful, indecisive or dilatory purchaser who takes ten". The Court added that it had the feeling that there was a "subtle underplaying" of the abridgment and re-titling legends on some of the covers.

The Court dismissed the publisher's contention that the Commission order that the legends appear in "clear and conspicuous type" failed to establish a properly detailed standard and therefore failed to comply with due-process requirements. The Court declared that the type size and style needed to comply with the order would vary with the color and design of the cover, and that no "universal formula" could be devised.

Since the Court's decision was impelled by former cases in the Circuit—notably *New American Library, Inc.* v. *Federal Trade Commission*, 213 F. 2d 143—one judge concurred separately by stating that he would dissent were the case before him *de novo*. He declared that the "clear and conspicuous type" standard was insufficient, and he

doubted that "a single trial examiner . . . without the aid of any testimony, expert or otherwise, is the one person in the entire judicial and quasi-judicial system best able to comprehend the approach of that non-existent character, the 'average reader,' in his purchase of a 'pocket' book." Moreover, he questioned the value of gearing the Commission's public policy to protect the "he-who-runs-may-read" book buyer.

(*Bantam Books, Inc.* v. *Federal Trade Commission*, United States Court of Appeals, Second Circuit, March 4, 1960, Friendly, J.)

What's Happened Since . . .

■ On March 7, 1960, the Supreme Court of the United States:

REVERSED (6-to-3, with opinion by Justice Whittaker) the decision of the United States Court of Appeals for the District of Columbia Circuit in *Tuscarora Indian Nation* v. *Federal Power Commission*, 265 F. 2d 338 (45 A.B.A.J. 177; February, 1959), and subsequent opinion in 265 F. 2d 344. The District of Columbia Circuit had held that a license issued by the Federal Power Commission to the Power Authority of the State of New York to construct a hydroelectric project did not authorize the Authority to take Tuscarora lands by eminent domain for use as a reservoir. The Supreme Court, reversing, ruled that the lands to be taken are not a "reservation" within the meaning of the Federal Power Act and that the eminent domain provisions of the Act authorize a Commission licensee to take Indian lands when needed for a licensed project, on payment of just compensation. The Court also declared that there was no treaty between the United States and the Tuscaroras that would prevent the taking, and that 25 U.S.C.A. §177, which prohibits alienation of Indian land unless "made by treaty or convention entered into pursuant to the Constitution", does not apply to the United States or a licensee under the Federal Power Act.

■ On March 28, 1960, the Supreme Court of the United States:

REVERSED (6-to-3, with opinion by Mr. Justice Stewart) the decision of the Court of Appeals for the Eighth Circuit in *Travelers Health Association* v. *Federal Trade Commission*, 262 F. 2d 241 (45 A.B.A.J. 287; March, 1959), in which the Eighth Circuit had held that the Commission did not have power to regulate the business of a Nebraska-domiciled mail-order insurance company which was licensed only there and in Virginia, but which sold insurance throughout the United States by mail. The Eighth Circuit's decision was grounded on a provision of the McCarran-Ferguson Act of 1945 providing that the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by state law", and on a 1957 Nebraska statute authorizing the state's Director of Insurance to issue cease-and-desist orders prohibiting "unfair or deceptive acts and practices in the conduct of the business of insurance" whether occurring in Nebraska or elsewhere. The Supreme Court, however, interpreted the McCarran-Ferguson Act as requiring regulation by the law of the state where the business activities have their "operative force", and its study of the legislative history led it to the conclusion that Congress did not believe that a state could regulate activities carried on beyond its own borders.

DENIED CERTIORARI in *New York* ex rel. *Sillifant* v. *Sheriff of City of New York*, 6 N. Y. 2d 487, 160 N.E. 2d 890, leaving in effect the decision of the Court of Appeals of New York that a New York grand jury had power to compel a person before it by subpoena to fill out a questionnaire relating to his personal finances, swear to it, and then return to appear before the grand jury to submit to further questioning.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

An analysis of the legislative process in terms of its functions in the light of generally applicable categories is useful as a basis for further study. Professor Mallison presents such an analysis in the thoughtful article which follows.

Functional Analysis of the Legislative Process

by W. T. Mallison, Jr., Professor of Law,
The George Washington University

AS MANY STUDENTS of civics will affirm, the functions of government are threefold: legislative, executive and judicial. If it is noticed that these supposed functions appear to correspond rather closely with the threefold classic institutional structure of the United States Government and of the state governments, amplification may be provided by pointing out that each of the named institutions performs each of the identically named functions. Then we are in a position, for example, to say that functional analysis of the legislative institution can be made by affirming that this institution performs the "legislative function". But immediately doubt comes to mind as to the utility for analytic purposes of a concept of function which is so normative-ambiguous[1] that it only defines "legislative function" in terms of itself. As any lawyer knows, the usefulness of legal concepts is, in at least substantial measure, in providing tools to break down larger problems into convenient constituent units which can then be dealt with on an individual basis but in the context of the larger problem. Most lawyers also know that inadequate concepts are likely to produce silly or harmful solutions and that, if such solutions do ensue, we are entitled to re-examine the concepts rather than to be stuck with the solutions. In establishing conceptual categories to analyze the legislative process[2] we are entitled to consider both the factual events in the operation of the process and the legal importance of those events. To phrase it negatively, we should reject at the outset categories of analysis which state only the preferences of some legal philosopher as to how he thinks the legislative process should operate. Without minimizing the importance of the improvement of the process, we require functional categories which reflect the operation of the process as it is as well as consider it as it could be improved.

Professors Harold D. Lasswell and Myres S. McDougal of the Yale Law School have developed seven categories of functional analysis and used them in international and comparative law, among other fields.[3] Their categories permit detailed analysis in terms of both operative facts and legal doctrines. In brief description, these functions are:

Intelligence:	information, fact finding, planning
Recommendation:	promotion of policies
Prescription:	enactment as law of particular policies
Invocation:	preliminary characterizations of conduct, demand for application
Application:	final characterization of conduct
Termination:	ending of prescriptions
Appraisal:	evaluation, consistency between objectives and results

The purpose of the present writer is to show the applicability of the seven functions just listed to the legislative process at any level of government. In doing so, he acknowledges with pleasure his basic debt to Messrs. Lasswell and McDougal and assumes full responsibility for the ensuing comments. There will be no attempt to make comprehensive analysis either in depth or in breadth and only enough detail will be provided to demonstrate the potential of this functional analysis. Under each heading the following questions will be posed: What are its factual characteristics? Who are the most important participants in the function? What legal doctrines are most applicable to the function?

I. Intelligence

A. *Characteristics:* It seems clear, if the legislative process is to serve rational purposes that, like the judicial process, it must begin with fact finding. The intelligence function embraces the development, collection and systematization of all information within the scope of probable or possible legislative action. As a practical matter the task of gathering information which is immediately relevant frequently precludes obtaining information which might be relevant. Relevant information is obtained from studies and research activities as well as from the testimony of individuals who have some knowledge of the subject area. Intelligence includes the preliminary appraisal of projected alternative courses of legislative action. It includes the drafting of various bills for legislative or legislative committee consideration at a later stage of the process.

B. *Participants:* In a broad sense,

1. "Legislative function" is said to be normative-ambiguous because in characterizing function as "legislative" it purports to establish a norm or standard but the norm is so ambiguous that we are left without sufficient characterization to provide minimum clarity concerning the supposed function.

2. The word-symbol "process" is deliberately used in both the title and the text to emphasize the dynamic qualities of the legislative institution as it is operated by people who choose among various policy alternatives.

3. See, *inter alia*, McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INTL. L. 1 (1959); Lasswell, THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS (Bureau of Governmental Research, University of Maryland, 1956); McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 137 (1953).

intelligence is provided by historians and newspaper reporters. It makes a tremendous difference as to whether the users of history treat it as a sentimental treasure or as a field for scientific inquiry. In a narrower sense, intelligence is provided by public and private researchers and by governmental and private witnesses appearing voluntarily or under compulsion of process before fact-finding committees of the legislature. Legislative counsel and other staff members and executive budget bureaus and departmental legislative planning groups all play their role here. In addition, the private citizen who brings facts to the attention of a legislator is participating in the intelligence function.

C. *Applicable legal doctrines:* The most obvious doctrinal area here is the fact-finding legislative hearing. This would include the constitutional and legislative bases for the legislative power of investigation and the responsibilities and rights of witnesses appearing before legislative committees. In addition, the intellectual and skill requirements of legislative drafting should be considered under this heading. This would include consideration of the types of statutes and their form and arrangement.

II. Recommendation

A. *Characteristics:* Recommending is the advancement of particular policy alternatives. It includes all activities aimed at the adoption of particular policies. Thus conceived, it includes all recommending activities in fact and is not limited to formal recommendations made by and to legislators. In a democratic society the permissive character of the recommending function serves to insure a range and diversity of proposals for legislative consideration which would not be available in a totalitarian society.

B. *Participants:* The number of those who take a measure of initiative in proposing legislative policies is also very great in a democratic society. The group includes authorized governmental spokesmen (from executive, legislative, and sometimes judicial, branches) as well as private individuals speaking for themselves and for all shades of group opinion.

C. *Applicable legal doctrines:* The most important doctrines here are those identifying and regulating lobbying activities by all government and private groups. The private groups include political parties[4], pressure groups[5], and private associations.[6] Of course, individual lobbying activities are also subject to identification and regulation. Detailed consideration should be given to the right to petition government guaranteed by the First Amendment to the United States Constitution and to the need to identify the lobbyist with his pressure group or other principal so that rational legislative choices can be made.

III. Prescription

A. *Characteristics:* Prescription is the formal enactment of policy into an authoritative (governmentally supported) rule or norm to govern human behavior. It involves the selection of particular ideas from the intellectual market place and endowing of them with the status of law.

B. *Participants:* This function is performed by the members of the legislative and executive institutions working together to comprise the legislative process. This is a governmental function and it can only be performed by officials acting as such. Unlike some other functions, there is no place for participation of private individuals. The legislative officials in voting on the enactment of measures and the chief executive official in approving or vetoing bills monopolize this legislative function to the exclusion of private groups and individuals. (Of course, from a broader governmental perspective, judges are authorized to determine the consistency between legislative prescriptions and basic constitutional ones.)

C. *Applicable legal doctrines:* Here we are concerned with legislative structure, organization and procedure (including the role of the executive in the process). The legal consequences of unicameralism and bicameralism (including the role of the conference committee) immediately come to mind. Under the heading of organization, the committee system and its practical operation should be considered. Procedural steps in legislative action should be analyzed in detail. The coverage should include legislative records and their uses. At the state government level, constitutional limitations on the use of special and local statutes and requirements as to the use of general legislation in certain circumstances should be examined. The unrealistic state requirements of reading bills in full to literate legislators would also come under scrutiny.

IV. Invocation

A. *Characteristics:* Invoking involves setting in motion the governmental machinery which ultimately results in application of the prescription to the settlement of a controversy. Invocation is the tentative characterization of conduct according to the rules prescribed by the legislature.

B. *Participants:* Invoking is usually done by officials of the executive or judicial branches. Thus a prosecuting attorney may persuade a grand jury that a particular situation calls for the issuance of an indictment. In a noncriminal case a private citizen may invoke the prescribed rule by retaining counsel to bring suit against another private citizen. Some legal principles are invoked by administrative commissions which perform duties sometimes associated with legislative, executive, and judicial institutions of government. Other rules are set in motion by the direct action of executive officials.

C. *Applicable legal doctrines.* The doctrines include comparative study of various methods of setting the legal machinery in motion from the standpoint of their probable effectiveness in bringing about compliance with the legislative prescriptions. For example, civil suits for damages may be contrasted with fines and other criminal penalties.

V. Application

A. *Characteristics:* Applying is the

4. "Political parties", as used here, refers to groups which present a comprehensive political program and at least fairly complete lists of candidates.

5. "Pressure groups" refers to single interest or narrow interest groups.

6. "Private associations" are groups, like private corporations and labor unions, which are organized for other purposes than influencing the legislative process but do, in fact, influence it.

definite characterization of conduct according to the standards set forth in the legislative prescription. It is the use of general rules for the solution of particular problems. It takes place in judicial, administrative, or executive contexts depending upon the type set forth in the legislation. In broader conception, it is the whole administration of government under statutory law.

B. *Participants:* Judges, administrative officials, and executive officers all apply legislative enactments in various situations. Within broad constitutional limits, the selection of which kind of officials will apply the rules is a matter of legislative policy. The suitability of particular types of officials for certain kinds of law enforcement and administration thus becomes an important legislative policy question.

C. *Applicable legal doctrines:* Statutory interpretation and sanctions are of primary concern here. Experienced lawyers will recognize that the former is one of the most difficult and challenging problems encountered in legal work. Sanctions or enforcement is at least as difficult and challenging but so little is known about it that it is usually passed over in silence even where it is clearly involved in a legal problem. For example, criminal law (considered as both case and statutory) is the oldest branch of the common law and one might expect that understanding of its enforcement problems would be at least adequate after the experience of almost a thousand years in working with them. However, this is not the situation at all even if sanctions are narrowly conceived as a simple matter of meting out punishment to wrongdoers. If criminal sanctions are regarded from a preventive standpoint with the primary objects of protecting society and reforming wrongdoers, the inadequacy of contemporary and past criminal law sanctions becomes even more obvious. It is the firm opinion of the writer that if "applying" as a functional category serves to focus attention on the crucial legal problems of sanctions that the use of the category will be amply justified.[7]

It is to be expected that criminal law sanctions problems will appear quite differently from judicial and legislative viewpoints. The judges are very properly concerned with the consistency between a sanction and the constitutional requirements of due process for an accused. The legislators, by way of contrast, are concerned with the effectiveness of alternative sanction devices in effectuating the objects of the criminal law. It should be emphasized that the sanctions problems are present in criminal law and that there is no escape from them whether a legislature uses the best available insights concerning human behavior or hunch and guesswork to deal with them.

VI. Termination

A. *Characteristics:* Termination is the effective ending of a legislative enactment. It may be accomplished by a new statutory prescription or by amendment or revision of an old one. The foregoing might be described as willed or intended termination. The terminating function can also be performed by the simple passing of time with the result of statutory obsolescence and inapplicability to current facts.

B. *Participants:* Of course, legislators and chief executives as participants in the legislative process are responsible for intended termination. Judges are responsible for termination of a statutory rule in a case properly brought before them where the statute is inconsistent with the constitution. Real as opposed to nominal termination may be accomplished by jurors returning a verdict of "not guilty" where they are convinced beyond a reasonable doubt of the guilt of the accused but, in their opinion, the sanction is too severe in relation to the offense.

C. *Applicable legal doctrines:* The parts of statutory interpretation and legislative drafting concerned with the effects of revisions, amendments, reenactments, retroactive statutes, and codifications are of special importance here. In addition, the problems of repeal by implication and supposed inconsistency between different statutes should be considered.

VII. Appraisal

A. *Characteristics:* Appraisal is an evaluation of previous legislative attempts. Adequate performance of this function would require continuing examination of the consistencies and discrepancies between legislative objectives and effects achieved in the total context of the values of a democratic society. The objective of the appraisal function is to develop rational recommendations for future legislative action (or inaction) and not just to perform a theoretical exercise. Thus conceived, the performance of this function completes the legislative cycle and merges into the intelligence function.

B. *Participants:* In a democratic society an intelligent and informed electorate is capable of performing an effective appraisal role in the general terms in which it must deal with issues. Political parties are probably our most important institutions for the critical and constructive appraisal of legislative performance. Pressure groups and private associations can usually be expected to appraise from a narrower interest perspective than national political parties.

One expects to find legislative bodies and their committees and professional staffs engaged in fairly specific appraisal activities. An example of continuing executive appraisal may be found in the practise of legislative clearance designed, in part, to achieve a consistent set of legislative proposals. Budget bureaus typically perform this task and also examine legislative performance from the financial standpoint. Without minimizing the importance of financial appraisal, one may question whether or not legislation is as systematically examined from other important perspectives. It seems clear that national security simply defined as freedom from wanton aggression and coercion involves values which are not susceptible of adequate measurement in financial terms alone.

C. *Applicable legal doctrines:* Appraisal, when adequately performed, is so broad that it would be artificial in the extreme to identify it with any limited set of doctrines. It should include evaluation of all functions and of all the doctrines of formulation and appli-

7. See the recent penetrating analysis of criminal responsibility: Lasswell and Donnelly, *The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L. J. 869 (1959). See on criminal sanctions generally P. W. Tappan, CRIME, JUSTICE AND CORRECTION (to be published in 1960); W. C. Reckless, THE CRIME PROBLEM (2d ed. 1955).

cation of legislation. This task should include appraisal of broad legal significance as well as the problems of legal technicality and detail.

It may be said at once that the functions to be appraised do not comprise air tight intellectual compartments. On the contrary, the overlapping and interrelation is so great that the malperformance of a single function can have disastrous consequences for the entire legislative process. In the same way, there is a large measure of doctrinal overlapping. Consider, for example, the futility of an attempt to separate completely legal drafting from statutory interpretation. In a real sense, the two are the same problems considered from different functional perspectives.

Conclusion

To the extent that a lawyer's work is problem solving, the law schools should be concerned with developing insights into the intellectual tools which are useful in solving new problems rather than just dealing with a multitude of solved problems of contemporary and historical importance. Among the requisite intellectual tools is functional analysis designed to locate legal doctrines in the context in which they appear in the world of factual events. The seven functional categories examined in this paper focus attention on the key steps in the legislative process and open up promising lines of inquiry for its improvement. There can be no doubt of the importance of this subject in an era when democratic values and legal processes are under attack throughout the world. The United States has, thus far, made a significant international response to this challenge by both military and peaceful cooperation with free countries throughout the world.[8] The urgent domestic corollary is the improvement of our governmental institutions and legal processes including the legislative process at federal, state, and local government levels.[9]

8. For details concerning the grave international problems confronting the United States in the next decade see the symposium entitled. *Spectrum of Conflict 1960-1970*, 3 Journal of the Stanford Research Institute 113 (1959).

9. Incisive analysis of the inadequacies of our state legislative institutions and processes together with specific recommendations for improvement may be found in a recent book: Fordham. The State Legislative Institution (1959).

Inter-American Bar Association Will Meet in Bogotá Next Year

The Inter-American Bar Association was founded at Washington. D.C., on May 16, 1940, by a group of distinguished lawyers and jurists from nearly all of the nations of this hemisphere. Consequently, it will celebrate its twentieth anniversary this month. The organizing meeting was held as a result of action taken by the American Bar Association recognizing the need for such an agency.

The purposes of the Association as stated in Article I of its Constitution are:

> To establish and maintain relations between associations and organizations of lawyers, national and local in the various countries of the Americas, to provide a forum for exchange of views.
>
> To advance the science of jurisprudence in all its phases and particularly the study of comparative law; to promote uniformity of commercial legislation; to further the diffusion of knowledge of the laws of the various countries throughout the Americas.
>
> To uphold the honor of the profession of the law; and to encourage cordial intercourse among the lawyers of the Western Hemisphere.
>
> To meet in Conference from time to time for discussion and for the purposes of the Association.

Membership—The Association has two categories of membership, namely, (1) Association members and (2) individual members which are admitted as a result of an amendment of the Constitution and By-Laws in 1956. There are now 87 member Associations and 910 individual members.

Conferences—Eleven successful Conferences have been held, namely, Havana, Cuba, 1941; Rio de Janeiro, Brazil, 1943; Mexico City, Mexico, 1944; Santiago, Chile, 1945; Lima, Peru, 1947, Detroit, Michigan, 1949; Montevideo, Uruguay, 1951; São Paulo, Brazil, 1954; Dallas, Texas, 1956; Buenos Aires, Argentina, 1957; Miami, Florida, 1959.

Plans for the Twelfth Conference, which will be held at Bogotá, Colombia, January 27-February 3, 1961, are being developed under the leadership of the President, Dr. Mauricio Mackenzie. The Association endeavors to hold its meetings every two years in the odd years so that its Conferences will not conflict with those of the International Bar Association which are held during even years. A meeting of the Executive Committee and available members of the Council was held at Acapulco, Mexico, on March 14, 1960.

William Roy Vallance, Secretary-General of the Association, has announced the first edition of the *Inter-American Bar Association Newsletter* which should draw the membership closer together.

The publication of the *Newsletter* was authorized by Resolution No. 65 at the Miami Conference:

> 1. That subject to available funds the Council authorize the Secretary General to publish and distribute an Inter-American Bar Newsletter in English and Spanish;
>
> 2. That an appropriate sum be set aside for said publication and distribution; and
>
> 3. That the Secretary General be authorized to appoint an Editor and staff necessary to accomplish this purpose.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.

The Constitution Revisited: The Power of Congress To Levy a Tax

By Morton A. Smith, New York, New York

Not since 1920 has a federal income tax statute been declared unconstitutional.[1] In the recent case of *Penn Mutual Indemnity Co.*[2] two dissenting judges of the Tax Court held that Section 207(a)(2) of the Code of 1939 (re-enacted in substantially identical form as Sections 821-823 of the 1954 Code), as applied to the facts at bar, was repugnant to the Constitution.

On its 1952 return the company reported $1,256,675 as its "gross amount of income". Its underwriting losses (payments on claims) not recognized as a deduction under Section 207(a)(2), *exceeded* the above amount by $206,198.

It should be noted that mutual casualty insurance companies, such as *Penn Mutual*, do not compute their "income" tax under the general corporate provisions of the Code, as special provision is made for this computation. Briefly, if the "gross amount of income" (net premiums,[3] rents, dividends and interest) exceeds $75.000, then a flat percentage rate is applied thereto. The resultant figure is the tax.

In the instant case the rate applied was 1 per cent of the "gross amount of income". Under Section 207(a)(2), no deduction for such items as ordinary and necessary business expenses enter into the tax computation.

The taxpayer contended that since actual indemnity losses (pay-outs) exceeded its gross receipts by over $200.000, the tax imposed was on gross receipts (without deduction for those losses) and was not a valid income tax.

The Court considered the validity of Section 207(a)(2) by inquiring whether the Constitution prohibits the taxing of gross receipts, under a tax denoted nominally as an income tax, without in this case making allowance for any expense incurred in the production of those receipts. Most attorneys would assume that there is no income to be taxed. The majority of the Tax Court, however, upheld that section as a valid exercise of the congressional power to levy a tax.

This opinion is a landmark in the application of the Constitution to tax matters not only because of the decision, but also because of the thorough and painstaking analysis of the issues in both the majority and dissenting opinions. The entire court agreed that the Sixteenth Amendment to the Constitution conferred no new taxing power on Congress.[4] The taxing power is conferred under Article I, Section 8 of the Constitution and is "exhaustive and embraces every conceivable power of taxation".[5] The only constitutional restraints on that power are that all imposts and duties shall be geographically uniform in application;[6] that capitation and other "direct" taxes must be apportioned among the states according to population;[7] and, that no tax or duty be laid upon exports.[8]

Thus stated, the majority opinion concluded that the tax involved was valid as an indirect or excise tax on the conducting of an insurance business. The dissent held that the tax was neither an excise nor income tax, but was a "direct" tax which must be apportioned according to population—hence, as applied therein, unconstitutional.

Majority Opinion

The opinion commenced by restating the general presumption in favor of statutory validity. The court recognized that this presumption is particularly strong in the case of a revenue measure and that tax legislation should not be lightly or unadvisedly set aside.[9]

With this general principle as its base, the court proceeded to erect the structure of its position. Since the statute was geographically uniform in application, the only objection to its validity that could be raised was that it was a "direct" tax which must be apportioned according to population.

The majority noted that throughout our history the term "direct" tax had been given a narrow and restrictive interpretation. Thus in numerous cases, the Supreme Court had sustained, as being a form of indirect taxation, a number of unapportioned taxes, on a wide variety of articles or transactions.[10]

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1. *Eisner* v. *Macomber*, 252 U.S. 189; *Evans* v. *Gore*, 253 U.S. 245 later overruled; *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939).

2. *Penn Mutual Indemnity Company (Dissolved), Francis R. Smith Insurance Commissioner of The Commonwealth of Pennsylvania, Statutory Liquidator* v. *Commissioner of Internal Revenue*, 32 T.C. 653 (1959), affirmed (3d Cir. April 7, 1960). Due to the limitations of space, this article will only highlight the constitutional issues raised in the Tax Court and no attempt will be made to engage in extensive critical comment. EDITOR'S NOTE: the author was trial attorney for the respondent in the Tax Court proceedings. This article was submitted for publication prior to the decision of the Court of Appeals which affirmed the opinion of the Tax Court without extensive discussion of the constitutional issues that were raised.

In addition to the constitutional issues raised, the *Penn Mutual* case also contains a lengthy discussion pertaining to the definition of a "deficiency" as it relates to the jurisdiction of the Tax Court.

3. §207(b)(2) defines "net premiums" as follows: " 'Net premiums' means gross premiums (including deposits and assessments) written or received on insurance contracts during the taxable year less return premiums and premiums paid and incurred for reinsurance . . .". As applied to *Penn Mutual*, "net premiums" were in reality its gross premiums.

4. Judge Raum speaking for the majority stated: "In dealing with the scope of the taxing power the question has sometimes been framed in terms of whether something can be taxed as income under the 16th Amendment. This is an inaccurate formulation of the question and has led to much loose thinking on the subject. The source of the taxing power is not the 16th Amendment; it is Article I, section 8, of the Constitution."

5. *Brushaber* v. *Union Pacific RR*, 240 U.S. 1 (1916).

6. Article I. Section 8. Clause 1.

7. Article I. Section 2. Clause 3 and Article I. Section 9. Clause 4.

8. Article I. Section 9. Clause 5.

9. *Nichol* v. *Ames*, 173 U.S. 509 (1849).

10. Among the examples noted were the following: A "special" tax upon dealers in certain commodities, *License Tax Cases*, 5 Wall. 462 (1867); a tax on sales at commodity exchanges, *Nichol* v. *Ames*, 173 U.S. 509 (1899); a tax on the transfer or sale of securities, *Treat* v. *White*, 181 U.S. 264 (1901); a tax on the issuance of state bank notes, *Veazie Bank* v. *Fenno*, 8 Wall. 533 (1869); a tax on manufactured tobacco having reference to its origin and intended use, *Patton* v. *Brady*, 184 U.S. 608 (1902); a tax on the manufacture and sale of oleomargarine, *McCray* v. *United States*, 195 U.S. 27 (1904).

After an examination of certain Civil War and other taxes which the majority noted were not taxes on "gain" or "profit" but were taxes on "gross receipts", and were sustained by the Supreme Court, the majority stated:

> We think it clear that wholly apart from the 16th Amendment, section 207(a)(2) is entirely within the all-inclusive taxing power of Congress under Article I, section 8, and that the crippling and inequitable apportionment requirement has no application here.

After concluding that the statute was valid as coming within the power of Congress under Article I, Section 8, the opinion discusses the significance of the Sixteenth Amendment in the general scheme of federal taxation.[11]

That amendment has its genesis in *Pollock* v. *Farmers' Loan & Trust Co.*[12] where a sharply divided Court declared invalid a statute taxing among other items, income from real property and invested personal property. The rationale in *Pollock* was that the income from those sources was so closely identified with the *sources* themselves that the tax was in reality, a tax on the property itself (a direct tax) and lacking apportionment was unconstitutional. By divorcing income from its *source*, the Sixteenth Amendment eliminated the keystone of the *Pollock* doctrine and lifted a restriction on the already broad power of Congress to levy a tax.[13]

Relying exclusively on this broad power, the majority sustained the tax as an excise on the carrying on of an insurance business.[14] However, the court said that it need *not* decide whether the Sixteenth Amendment requires that certain items (presumably, cost of goods sold, return of capital, etc.) be allowed as deductions. The rationale of this position is that the court need not involve itself in the application of the Sixteenth Amendment nor inquire as to the existence of income since the statute was valid as an indirect or excise tax.

Dissenting Opinion

Judge Train with whom Judge Forrester concurred, wrote a lengthy and exhaustive dissent. It was their view that the statute, as applied to *Penn Mutual*, was unconstitutional as being a "direct" tax on property.

Judge Train agreed with the majority's analysis of the issues raised and stated that the opinion provided a "significant service in clearing away certain misconceptions concerning the nature and scope of the federal taxing power". The dissent noted, however, that there had been some support in the case law and commentaries for the view that the Sixteenth Amendment prohibited Congress from levying an income tax on anything that was not income. For example, it had been stated that Congress must allow a deduction for cost of goods sold, recovery of capital, allowance for losses, etc. This position is, however, without basis in the Constitution.[15]

The dissent then noted that cases of this nature may be approached in either of two ways. First, the inquiry may be made as to whether the tax is direct or indirect. If found to be indirect, then if geographically uniform in application, it is valid. If, however, it is found to be direct, then and only then need one inquire as to whether the tax is on "income" and under the Sixteenth Amendment not subject to apportionment. The second approach is to inquire whether or not the tax is levied on "income" within the meaning of the Sixteenth Amendment. If so, then it is valid because there is no requirement of apportionment. If found not to be a tax on "income", then it is necessary to decide whether it is direct or indirect. The dissent adopted the second approach because it led into familiar ground, namely the nature of "income".

The primary contention of the taxpayer was that the tax, as applied to it, was invalid as an income tax because it failed to allow a deduction for underwriting losses and was, therefore, a tax on gross receipts and not limited to gross or net income. The taxpayer argued that its losses were akin to the "cost of goods sold" of a manufacturer. The dissent noted that the principle is well established that a manufacturer is entitled to deduct the cost of his materials from gross sales in arriving at gross taxable income. The dissent noted that an insurance business is not a mercantile business having a "cost of goods sold" in the traditional meaning of that term. However, it applied an analogy which, though not completely apposite, was in its view applicable to the case at Bar. The taxpayer was engaged in the business of selling a contract right and therefore must have had costs to produce its gross receipts. It would be ignoring reality, and indulging in a form of economic fantasy, to state that because taxpayer was not in a mercantile business it had no "cost of goods sold" in an economic sense. Taxpayer's costs were represented by the amount it paid out in satisfaction of claims to its policyholders. To the extent the possession of premiums or assessments were equal to its losses, the company had nothing which it could apply to its own benefit or enjoyment. There was no gain. Therefore, if losses exceeded receipts, taxpayer obviously had no income.[16]

Once it has been decided that the subject of a tax is not "income" within the meaning of the Sixteenth Amendment, no more has been decided than that the tax is not free from the requirement of apportionment, if it is a direct tax. Thus, the crucial focus of the inquiry must be upon whether this is a "direct" tax.[17]

The dissent believed that the *Pollock* decision expanded the meaning of "di-

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11. U.S. Constitution, Amendment 16: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

12. 157 U.S. 429 (1895); 158 U.S. 601 (1895).

13. "The famous Sixteenth Amendment gives Congress the power to lay and collect income taxes without apportionment, thus to all practical purposes eliminating the principal applicability of Article I, Section 2, Clause 3, of the original Constitution." Paul, TAXATION FOR PROSPERITY (1947), page 209.

14. *Stanton* v. *Baltic Mining Co.*, 240 U.S. 103 (1916).

15. The dissent stated thus: "So stated, this reasoning is without basis in the Constitution as is ably demonstrated by the majority opinion. Once it has been determined that a particular tax is imposed on something which is not income, that determination in and of itself decides nothing insofar as the constitutional validity of the tax is concerned. The inquiry must be pushed further. A tax imposed on that which is not income is nonetheless valid *unless it is a direct tax unapportioned.* Thus, the key question is whether the tax is direct or indirect."

16. The dissent relied principally on *Eisner* v. *Macomber*, *supra*, in noting that "gain" is an indispensable ingredient in determining whether "income" exists or not.

17. See dissent of Justice Holmes in *Eisner* v. *Macomber*, *supra*, wherein he states: "The known purpose of this Amendment (Sixteenth) was to get rid of nice questions of what might be direct taxes."

rect" taxation by invalidating a tax imposed on property by reason of its ownership. The gross receipts in the hands of *Penn Mutual* were property under any definition of that term. To the extent such receipts were not reduced by losses and thus not limited to "income", the tax under Section 207(a)(2) was a tax on property because of ownership; not being apportioned, it was invalid.

The *Pollock* decision, reasoned the dissent, stated that income from certain sources (real property, income from invested personal property) was so closely identified with its source as to be a tax on the *source* itself. The purpose of the Sixteenth Amendment was to eliminate the apportionment requirement when applied to a tax on income by stating that "income", regardless of its source, may be subject to tax. Therefore, the doctrine of the *Pollock* case is still applicable where no "income" is present and that a tax, such as the one at issue, is in reality a tax on property because of ownership and as such is a direct tax which must be apportioned according to population.

The dissent then attacked the position of the majority in sustaining this tax as an excise on the conducting of an insurance business. If the majority was correct in its view of what is an indirect tax, then a new distinction based not upon *source*, but upon whether a particular taxpayer is in a trade or business would become the guide in determining whether a given tax was direct or indirect. The dissent refused to believe that the court could (or should) convert a tax on property (gross receipts) into an indirect tax merely because the taxpayer was engaged in a trade or business because the *type* of property involved, rather than the *status* of the owner of the property, should be the determining factor in this area.

In arriving at its conclusion, the dissent was not unmindful of two Supreme Court decisions rendered subsequent to *Pollock* which were relied upon by the majority.[18] In *Spreckels* a tax on the gross receipts of sugar refiners was upheld as an excise tax on the doing of business. The Court in *Spreckels* placed reliance on its earlier decision in *Pacific Insurance Co.* v. *Soule*,[19] in which a tax very similar to Section 207(a)(2) was upheld as an excise on the carrying on of an insurance business.

The dissent believed that *Pollock* had overruled *Pacific Insurance Co.* and that reliance thereon by the Supreme Court had been misplaced. Further, in *Spreckels* the Court placed great weight on the expressed intent of Congress to levy an excise tax. The dissent, while stating that mere form cannot govern the validity of a tax, believed that later Supreme Court decisions effectively rejected the argument that a tax on gross receipts can in all respects, be upheld as an excise and valid in the absence of apportionment, irrespective of whether there is "income" or not.[20]

Stanton v. *Baltic Mining Co.* was cited by the majority for the proposition that Section 207(a)(2) was sustainable as an excise on the carrying on of an insurance business. In that case, the taxpayer argued that the statute there involved was void in that it failed to allow a deduction for "true" depletion. The dissent pointed out first, that "true" depletion is conjectural and often impossible to ascertain. Secondly, the statute did allow a reasonable deduction for depletion, subject to an over-all limitation. On these two grounds, the *Baltic Mining* case was rejected as sound authority for the proposition expounded by the majority.

The dissent believed that the conclusion announced by the majority was impliedly negated by the Supreme Court in *Helvering* v. *Independent Life Insurance Co.*[21] where the Court rejected the argument that the rental value of a building occupied by the owner constituted income within the Sixteenth Amendment citing *Eisner* v. *Macomber*, and that a tax on such value as income would be a direct tax requiring apportionment.[22]

It was the opinion of the dissenting judges (and by implication, the majority agreed) that the tax involved in *Penn Mutual* was not a tax on "income" as that term had been judicially defined. The dissent, after an examination of the usual indicia of excise taxes concluded that Section 207(a)(2) was not an excise tax nor did Congress intend that this tax be treated as an excise.[23] Relying principally on the *Pollock* decision, which in its view extended the meaning of "direct" taxes, the dissent concluded that the tax involved was direct in that it was a tax on property because of ownership. Lacking apportionment, it was unconstitutional and void in its application in the instant case.

Regardless of which of the views of the Tax Court the appellate tribunal will ultimately accept and uphold, the analysis and exposition of both the majority and dissenting opinions in *Penn Mutual* will remain one of the leading judicial pronouncements in the field of the constitutional power of Congress to a levy tax.

18. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S. 397 (1904); *Stanton* v. *Baltic Mining Co.*, *supra*.
19. 7 Wall. 433 (1868).
20. *Southern Pacific Co.* v. *Lowe*, 247 U.S. 330 (1918); *Eisner* v. *Macomber*, *supra*, (1920); *Bowers* v. *Kerbaugh—Empire Co.*, 271 U.S. 170 (1926).
21. 292 U.S. 371 (1934).
22. Surrey and Warren in their casebook on FEDERAL INCOME TAXATION (1955 Edition) page 115, note that the Supreme Court announcement in *Helvering* v. *Independent Life Insurance Co.*, *supra*, cited and relied upon by the dissent, was dictum. The authors state: "Today, however, it is generally believed that there is no constitutional barrier to the inclusion of this form of income."
23. The dissenting judges noted that no support for the majority opinion, sustaining the tax as an excise, could be found in the legislative history of Section 207(a)(2). Further, the name of the tax; its place in the statute (income taxes); the administration of the tax; the type of return used; were some of the factors relied upon by the dissent in concluding that the usual indicia of an excise tax was absent from this section.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Secretary, Junior Bar Conference;
Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

Government Vacancies for Young Lawyers

The Junior Bar Conference has instituted job opportunities information service for young lawyers interested in placement with the United States Government. The service has been organized by the Committee on the Status of the Young Lawyer in Government under the chairmanship of Edwin S. Rockefeller III, of the Federal Trade Commission. George M. Coburn of the Navy Department, one of the vice chairmen of the committee, is responsible for the administration of the program.

The program is designed to provide a central point from which information concerning current vacancies for young lawyers in government agencies will be disseminated. Most agencies of the Federal Government are cooperating with the Conference by making this information available. In turn, the Conference will make information available to interested lawyers without attempting to counsel either the applicant or the department where the vacancy exists.

Information is available concerning government agency openings for attorneys in grades GS-7 through GS-12. Examples of such information are as follows:

(a) On March 4, 1960, the Department of the Army reported legal openings available in various areas of the United States.

GS 7
Little Rock District Engineer
Little Rock, Arkansas (job actually in Rogers, Ark.)
Real Estate

GS 11
Army Ordnance Missile Command
Huntsville, Alabama
Procurement

GS 11 (four jobs)
Little Rock District Engineer's Office
Two in City of Little Rock
One in Dardanelle
One in Rogers
Real Estate Field

GS 9
Kansas City District Engineer
Kansas City, Missouri
Real Estate

GS 12
Tulsa District Engineer
Tulsa, Oklahoma
Procurement

GS 7
St. Louis Ordnance District
St. Louis, Missouri
Procurement

GS 9
Birmingham Ordnance District
Birmingham, Alabama
Procurement

GS 9
Philadelphia District Engineer
Philadelphia, Pennsylvania
Procurement

GS 11
Tulsa District Engineer
Tulsa, Oklahoma
Procurement

GS 7 or 9
Chicago District Engineer
Chicago, Illinois
Procurement

GS 9 (two jobs)
Chicago District Engineer
Real Estate

GS 11
Signal Supply Agency
Chicago, Illinois
Procurement

GS 11
Mobile District Engineer
Mobile, Alabama
Procurement

Applicants may apply for these positions by sending Standard Form 57 to M. Reynold Sands, Office of the Secretary of the Army, Washington, D. C. When applying on Form 57, the applicant should note the size of his graduating class and his rank in the class plus the date of admission to the Bar.

To qualify for the grade of GS 7, the applicant must be in the top 50 per cent of his law school class. Starting salary for GS 7 is $4,980 per year. To qualify for GS 9, GS 11, or GS 12, the applicant must have either graduated in the upper 10 per cent of his graduating class or have had respectively eighteen months' three years', or four years' experience. Beginning salaries are as follows: GS 9—$5,985; GS 11—$7,030; GS 12—$8,330.

(b) The office of the General Counsel, Department of Agriculture, reported two vacancies in grade GS 7 on March 18, 1960. The vacancies are in Washington, D. C. Correspondence should be addressed to:

Miss Margaret K. Randle
Personnel Officer
Office of the General Counsel
Department of Agriculture
1302 South Agriculture Building
Washington 25, D. C.

(c) The Department of the Air Force on March 24, 1960, reported a possible opening for one lawyer at the junior level. GS 7 or GS 9. They would be interested in interviewing applicants with top-level academic records. Applicants should address inquiries to:

Arthur D. Holzman
Assistant General Counsel
Department of the Air Force
Washington 25, D. C.

(d) The Federal Bureau of Investigation will conduct two thirteen-week training courses for special agents, beginning July 11, 1960, and September 12, 1960. Applications are now being considered. Applicants must possess the following qualifications: (1) They must be male citizens of the United States; (2) They must be willing to

serve in any part of the United States or its territorial possessions in which it is determined that their services are required; (3) They must be graduates from state-accredited resident law schools or graduates from four-year resident accounting schools with at least three years of practical accounting or auditing experience; (4) They must have reached their twenty-fifth but not their forty-first birthday on the date that the application is filed; (5) They must be at least five feet seven inches in height; (6) They must have uncorrected vision of not less than 20/40 (Snellen) in one eye and at least 20/50 (Snellen) in the weaker eye without glasses and at least 20/20 (Snellen) in each eye corrected. No applicant can be considered who has been found to be color blind; (7) They must be able to hear ordinary conversation at least fifteen feet with each ear; (8) Must be qualified in the operation of passenger carrying vehicles.

The starting salary for a special agent is the base of GS 10 or $6,505 a year. Investigating agent's salaries run to over $11,000 a year, through Grade 13. Agents in supervisory positions receive salaries of up to $18,000 a year.

Blank application forms may be obtained by those possessing the necessary qualifications by addressing a communication to the Director, Federal Bureau of Investigation, United States Department of Justice, Washington, D. C.

Current available government job listings for lawyers may be obtained by writing to Junior Bar Conference headquarters, American Bar Center, Chicago 37, Illinois.

Regional Meeting Program

The Conference will conduct sessions for young lawyers at the Regional Meeting in Portland, Oregon. Chairman Gibson Gayle will preside at sessions scheduled for Wednesday morning, May 25.

Robert A. Stewart, of Seattle, Washington, has planned the Junior Bar Conference program with the assistance of Robert S. Mucklestone, Conference Executive Council Representative for the Ninth District. James C. Harper, of Seattle, will speak on "Basic Problems in Probate Practice", William E. Love, of Portland, on the Oregon aspects and H. E. Tully, of Seattle, on the Washington aspects of this subject. William W. Wyse, of Portland, will speak on title insurance.

Mr. Gayle will present the Conference's Award of Progress to the Seattle-King County Young Lawyer's Section in recognition of its outstanding progress in 1959. The Seattle-King County Young Lawyer's Section was selected as the organization located in a city having a population of more than 500,000 showing the greatest over-all progress during the year 1958-59. Robert S. Mucklestone, president of the section, will accept the award.

All young lawyers in the Northwest region of the United States are invited to attend.

The above are Junior Bar Conference Committee Chairmen or Vice Chairmen unless otherwise indicated in attendance at the midyear meeting of the Conference held at the Edgewater Beach Hotel in Chicago in February.

Front row left to right: Lowell R. Beck, Administrative Assistant; Edwin S. Rockefeller III; William T. Wachenfeld, 3d District; Robert C. Ward; Miss Merilyn J. Brendel, Headquarters Secretary; Lewis A. Dysart; Paul L. Jaffe.

Back row left to right: Charles O. Brizius, Editor, *The Young Lawyer*; Richard S. Hawley; Robert O. Hetlage, Andrew J. Valentine; Edward F. McKie, Jr.; John C. McNulty; Lewis H. Hill III; J. Parker Connor; Robert H. Geffs; George T. Roumell, Jr.; K. Hayes Callicutt; Stanley H. Siegel; Richard F. Alden.

1960 Award of Achievement Competition

The 1960 rules for preparation and submission of applications for the Conference's Award of Achievement Competition have been announced by Committee Chairman Lewis H. Hill III, of Tampa, Florida.

Winners of the Award of Achievement will be announced at the 83d Annual Meeting of the American Bar Association at Washington, D. C., in August. An award of "State Junior Bar of the Year" is given to the best state unit entering the competition. An "Award of Progress" is given to the state unit showing the greatest over-all progress during the preceding year. Awards of honorable mention may be granted in each of these two categories. Similar awards are given also to local organizations of two categories: (1) units whose organization is located in

a city having a population of 500,000 or less; and (2) units whose organization is located in a city having a population of more than 500,000.

Inter-American Bar Plans for Twelfth Conference

On March 15, 1960, in Acapulco, the Junior Section of the Inter-American Bar Association offered its progress report on plans for the twelfth Conference of the Inter-American Bar Association to be held January 27-February 3, 1961, at Bogotá, Colombia. Co-chairman of the Junior Section, Donald K. Duvall, of Washington, D. C., announced that there are at present 167 members of the Junior Section (lawyers under 38 years of age), sixty of whom reside in Latin America and 107 of whom reside in the United States. Of this number, fifteen of the Latin American members and fifty-two of the American members affiliated within the past year.

The objectives for the 1959-61 program are: (1) Increase the number of young lawyers in the Association's membership; (2) Promote and strengthen the organization and program of active functional branches of the Section in each of the republics; (3) Improve the content and distribution of the *Junior Section Newsletter* as a primary means of communication among Section members of the Conference.

In order to strengthen its organization and program, the Section has endeavored to establish a Council composed of one national representative from each of the American republics. Each representative has primary responsibility for developing Junior Section branches or affiliates composed of young lawyers within their respective countries. Bolivia has taken the lead in having formed such an affiliate group, with Ecuador promising a similar branch in the near future. A Section handbook is now being prepared to facilitate development of these branches.

The effort to establish closer relations with senior law student groups has resulted in the establishment of an Inter-American Law Students Association at Harvard Law School.

Projects for State and Local Bar Associations

The Conference Projects Committee has launched an expanded program to assist affiliated junior bar units in their efforts to sponsor worthwhile activities. The committee has compiled information which specifies suggested procedure to be used in planning and conducting various programs.

Monthly project bulletins are being sent to units affiliated with the Junior Bar Conference. Each bulletin will describe and outline methods of conducting a suggested project or projects. Local and state junior bar units are requested to submit reports of their activities to either of the co-chairmen of the committee, George T. Roumell, Jr., 3380 Penobscot Building, Detroit 26, Michigan, and K. Hayes Callicut, Box 1172, Jackson, Mississippi.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

INDIVIDUAL LIBERTY: Out in Hobart, Australia, the Chief Justice of the Supreme Court of Tasmania, Sir Stanley Burbury, K.B.E., has been thinking deeply about this problem of maintaining individual liberty in our modern world. We lawyers who love fictions must face up to the facts of life. In his Ernest William Turner Lecture, delivered on March 10, 1959, at the Law School of the University of Tasmania, entitled "The Common Law and the Welfare State" ($2.00; Box 647C, Tasmanian University Law Review, Hobart, Tasmania), Chief Justice Burbury does not mince words about what's happened to us. It is published in the July, 1959, *Tasmanian University Law Review*.

> Industrial relations are now virtually completely removed from the field of freedom of contract . . . But what remains is important. A man who is not free to work for whom he pleases is not free at all. [Page 169.]

And the Chief Justice says that

> it is unreal to treat the principles of the law of contract which developed upon the assumption of individual bargaining as having any sensible application to such things as bills of lading, hire purchase agreements, insurance policies . . . and other standardized forms of contract adopted by modern companies and public corporations. [Page 170].

Speaking of the Sherman Act and England's Restrictive Trade Practices Act of 1956 "passed by a Conservative Government", the Chief Justice said:

> It was a recognition that the common law of competitive trading based on freedom of the individual may result in the very negation of freedom of the individual when it is applied to large industrial and business undertakings. [Pages 171-172.]

Likewise, land acquisition for public housing and the like takes from man "his property without his consent". Marketing legislation and national insurance legislation for accidents destroy the common law rights of the individual.

> Liability without fault was rare at common law [page 173].

What is the message of Chief Justice Burbury? It is this:

> I have suggested in the course of this paper that much of the modern legislation that goes with the Welfare State presents no real challenge to basic individual human rights.
>
> But some inroads there are; and the most dangerous threat to individual liberty in the modern Welfare State is the tendency in modern legislation to entrust to executive officers of government departments and public authorities the power to make decisions affecting individual personal and proprietary rights in such a way that those decisions are not effectively examinable in a court of law . . . The common law still speaks with a strong voice in relation to official action by means of the great prerogative writs of certiorari, prohibition, mandamus and by means of the declaration of Right [habeas corpus?]. The Courts may see to it that officialdom is kept within the powers conferred by statute. But the Welfare State demands that there must be left to officialdom some area of discretion into which the Courts may not trespass. The problem is, what is the area of unexaminable discretion to be?

Having said this, the good Chief Justice remarked that:

> It is, of course, inefficient to protect individual rights. It is much less time-wasting to give authority to an official to make a quick decision in secret rather than have the matter debated in a public court and submitted to an independent judiciary. But let us remember that it is also more efficient to put people in gaol without trial. It is much more efficient to reverse the onus of proof. In fact, it may be summed up by saying that dictatorship without the obstruction of the rule of law is much more efficient than any democracy could ever be. [Page 174.]

In conclusion, Chief Justice Burbury warned that

> We must . . . be eternally vigilant in this modern Welfare State to preserve these basic individual rights against insidious destruction in the name of efficiency . . . [page 174].

There are other good things in this second issue of the new *Tasmanian University Law Review* but none can compare with the Turner Lecture of Chief Justice Burbury. The General Editor of the *University of Tasmanian Law Review*, Professor R. P. Roulston, deserves our heartiest congratulations for bringing to our profession the wise remarks of the Chief Justice of Tasmania.

SUPREME COURT: Annually the *Harvard Law Review* publishes in its November issue a splendid analysis of cases decided at the previous term of the Supreme Court. Its more valuable feature is an analysis of pertinent court statistics checked by Joseph F. Spaniol, Jr., of the Administrative Office of the United States Courts. To this annual presentation, a member of the Harvard Law School faculty has been prefixing

a foreword. Whether drawn by lot or a volunteer, the victim this year was Professor Henry M. Hart, Jr., Charles Stebbins Fairchild Professor of Law.

His piece has caused such an explosion I had to turn back and be sure John Hervey hadn't written it. However, in my judgment, it is the finest article on the Court I have read this year and rates the Oscar of the 1959-1960 academic year in my book. I say this advisedly after reading a scorching criticism of it by a leading Washington, D. C., barrister. Every one should read Professor Hart's "Foreword" (73 *Harv. L. Rev.* No. 1, pages 84-125). And marvelous reading it is. (Address: Gannett House, Cambridge 38, Mass.; price: $1.50 an issue.)

The subtitle is "The Time Chart of the Justices". With painstaking detail, the Professor establishes that the Supreme Court of the United States is overworked and needs to reduce the back-breaking load that each Justice carries. Every wife of a Supreme Court Justice should be made to read Hart's recital of what a Justice is expected to do with his available time.

Mr. Hart begins apologetically by cautioning us against statistics. It seems he was once at O.P.A. where an O.P.A. economist was said to be "a man who believed that if you have a sample of ten girls of whom five are virgins and five are not, then each girl is fifty per cent virgin" (page 84). I see now why I hated O.P.A. Nevertheless, I *believe* his statistics which show:

AVAILABLE HOURS

TERM TIME (36 weeks, six days per week, 8 hours per day from the first Monday in October to mid-June to decide 1,540 cases during term time.....1,728 hours

DISTRIBUTION

SITTING IN COURT (16 hours per week Monday through Thursday about once a month; hearing 125 cases, about one hour per side) ..... 240 hours

FRIDAY CONFERENCES (Every Friday after a week of argument and "every other Friday preceding" a Decision Monday; about 2,000 decisions in 7,920 minutes at the rate of "one decision on the average every three or four minutes") .....132 hours

PETITIONS FOR CERTIORARI (about 480 in Term time half of which are frivolous and half are real)

Frivolous .....20 hours (five minutes each)

Non-Frivolous .....116 hours (three per hour or twenty minutes each)

JURISDICTIONAL STATEMENTS ON APPEALS (112 cases in Term Time; 30 minutes each)....56 hours

MISCELLANEOUS DOCKET (600 cases; 580 petitions for certiorari; 20 jurisdictional statements on appeals; all in forma pauperis; five minutes each).....50 hours

PRIVATE STUDY OF BRIEFS AND RECORDS (Two hours each of 125 cases) .....250 hours

OPINIONS (117 Court opinions; 81 concurring or dissenting opinions; total 198 opinions or 22 per Justice) .....528 hours

STUDYING OPINIONS OF COLLEAGUES (Besides his own 22, each Justice considers 176 opinions of colleagues plus draft opinions; one hour is allowed for 104 Court opinions and a half hour for each of the 72 concurring or dissenting opinions) .....140 hours

MISCELLANEOUS JUDICIAL WORK (Memorandum orders; 120 applications on the Miscellaneous Docket for prerogative writs; petitions for rehearing; motions; duties as Circuit Justice; Court duties as to rules etc.; general legal reading, social and official visits.) .....196 hours

Professor Hart does not itemize the time available per Justice during the sixteen weeks of summer recess but makes the point that time is necessary for rest and recreation, the preparation of addresses, law review articles, study of petitions for certiorari and appeals and special research of difficult law points in cases to be argued at the next term.

Pundit Hart is not the first Harvard Law School Professor to make the point that the Supreme Court of the United States is much too overworked. Others have done so (Dean Griswold's Morrison Lecture to the California Bar printed in the *Massachusetts Law Quarterly* for October, 1958, at pages 98 and 106-11; "Foreword" by Professor Ernest J. Brown to the *Harvard Law Review* summary of the Court's 1957 Term, 72 *Harv. L. Rev.*, No. 1, pages 77-95, November, 1958; Professor Paul Freund's Brandeis Lecture, 27 *Harvard Law Record*, No. 9, November 20, 1958, also 31 *New York State Bar Bulletin* 66, February, 1959.) And a certain professor at Catholic University Law School in Washington, D. C., made the same point in a speech to the District of Columbia Bar (March 5, 1958, see 86 *Washington Law Reporter*, pages 487-488). It's just that Professor Hart has done the job better than the rest of us. This department commented on Griswold's speech and Brown's article, 45 A.B.A.J. 190, and also on Freund's speech, 45 A.B.A.J. 634.

The most practical suggestion to relieve the Court from its excessive load comes from a lady lawyer (Doris M. Yendes, 25 *Univ. K. C. L. Rev.* 178). She asks that the Supreme Court appoint experienced lawyers as commissioners to aid each Justice instead of relying on green, inexperienced law students, eager beavers that they are. And the next best solution was Mr. Justice Harlan's request that each Justice be given four law clerks instead of two as at present. To date the Court has refused to have commissioners and it turned down the request of Justice Harlan for four law clerks. That's why I wish their wives would read Hart.

From his mass of statistics, the pundit draws these conclusions:

1. Except for the opinion writer, briefs are not read "carefully and

reflectively from beginning to end" but "are documents from which busy men have to extract the gist in a hurry". Thus the Bar must write its petitions for certiorari and jurisdictional statements on appeals "concisely and with utmost clarity" and its briefs should be organized "like a book of reference, for quick illumination on any particular point of concern" (page 94).

2. Oral argument is of critical importance. The two hours a Justice who does not write the opinion spends listening "must amount to nearly half and often more than half the total time" such a Justice is able to devote to the case.

3. The figures show conclusively... why the Court's traditional doctrine, that the denial of a petition for writ of certiorari imports no opinion upon the merits, is sound.

4. The figures "raise a question about the degree of intellectual respect which is due" summary adjudications because a half hour, without the aid of oral argument is not enough time "to ascertain with assurance . . . just what the problem in a case is, let alone to reflect about it and come to a wise decision".

By "summary adjudication" the Professor means those exceptional cases where a lawyer applies for certiorari and you resist in a formal answer, reserving your good arguments to use if and when the Court grants certiorari. In certain cases to the consternation of the defending lawyer the Court has had the bad habit of granting certiorari and summarily deciding the case in the petitioner's favor without any brief or oral argument from the defending party. It was this practice that Professor Brown so bitterly criticized (72 *Harv. L. Rev.* 77).

Professor Hart calls attention to a similar summary adjudication of an appeal on the jurisdictional statement in *United States* v. *Haley*, 358 U. S. 644, motion to vacate judgment denied, 359 U. S. 977, and petition for rehearing denied, 359 U. S. 981.

In his discussion of appeals, Hart contends they are being treated as if they were petitions for certiorari to which the rule of four applies. He states "it has long since become impossible to defend the thesis that all the appeals which the Court dismisses (for want of a substantial federal question) are without substance. And any pretense that jurisdictional statements are concerned only with jurisdiction, vanished when the Court began to affirm and even reverse judgments on the basis of them... when the practice works to the prejudice of the appellee through a reversal on the jurisdictional papers, it seems impossible to reconcile with conventional conceptions of due process of law" (page 89).

Continuing, these are Hart's other conclusions as I read them:

5. The figures show how dependent the Justices are on their clerks and "the heavy responsibility that lies upon Justice and clerk alike to see that the judgment of the Justice is genuinely assisted and not in any sense displaced" (page 95).

6. The figures establish that 125 cases are the most the Court can decide a year by full opinion.

7. It is not the number of cases but the quality of opinion that the Court is able to write so as to guide the profession.

8. Time spent to review issues of fact in Federal Employers' Liability, Jones Act and suicide cases (*Rogers* v. *Missouri Pacific*, 352 U.S. 500; *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521; and, *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437) is time poorly spent because these cases are not of sufficient national interest. The decision to review them "is in irreconcilable conflict with the unmistakable policy of the statutes which confer its [the Court's] jurisdiction on certiorari" (page 97). As Professor Freund would say, it is not "Brandisian."

9. The Court's position is such that it must decide cases in the grand manner, neither as *ipse dixits* nor on technicalities. Court opinions must be grounded in reason.

10. The Court should not attempt to decide 125 cases by full opinion but needs to reduce the number.

11. Trying to decide more cases in a term than it can do well has resulted in bad opinions . . . "These failures are threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court, and this at the very time when the Court as an institution and the Justices who sit on it are especially in need of the bar's confidence and support" (page 101).

Professor Hart states that down to 1955 the practice of the Court was to hold its conferences on Saturday. There are about twenty-four a term and each lasts about five and a half hours. The Warren Court cut the days for hearing oral arguments from five to four and Friday then became the conference day instead of Saturday.

I gather that Professor Hart regards the most "disturbing feature of the conditions under which the Court works" to be "the shortness of time available and used for collective deliberation and for private study of argued cases prior to such deliberation". He deplores "the known practice of the Court of voting on an argued case at the conference which comes at the end of the week in which the case was argued" (page 124). Votes which ought to be tentative become final and "positions tend to jell

before any member of the Court, in the usual case, has yet had an opportunity to make an intensive study of the problem." This means, says Hart, that the Justice selected by the Chief or Senior Justice at the Friday conference to write the Court's opinion is not only the only Justice to study the case intensively but that he works under a great handicap because his "non-writing brothers have already disabled themselves from dealing with uncommitted minds with the difficulties which intensive study turns up". It also contributes to there being about eighty-one concurring or dissenting opinions per term and to the Court's opinion sometimes ignoring points made by the dissent or vice versa the dissent's assuming that the Court position is on a point with respect to which the Court opinion is not clear.

The reader will observe that Professor Hart condemns the Court's taking for review cases involving questions of fact even where Courts of Appeals reverse jury verdicts. There are definitely two sides or three to this problem but the Professor sees only one.

Worse, Hart makes the mistake of trying to prove that the Court, because of the matters mentioned, did a very poor job in deciding *Irvin* v. *Dowd*, 359 U. S. 394.

In that case, Mr. Justice Brennan wrote for the Court, Mr. Justice Stewart concurred and Justices Frankfurter and Harlan wrote in dissent. Justices Frankfurter, Clark and Whittaker concurred with Justice Harlan's dissent. As I read his remarks, Professor Hart thinks that the entire Court did a poor job. The ones who wrote for what they said; the ones who concurred for concurring. For good measure, Professor Hart also pays his disrespects to the briefs of counsel (footnote 113, page 125).

Irvin v. *Dowd* was a habeas corpus case from Indiana. After the prisoner moved for a new trial on constitutional grounds (conduct of the prosecutor, denial of venue change, and prejudice of jurors), he made the mistake of escaping from jail. The motion was denied because of the escape but after his recapture in assigning error counsel alleged the trial court had erred in denying the motion and failed to detail reasons. The Supreme Court of Indiana held the denial of the motion proper when Irvin was at large but after so holding went on to review the record and conclude that Irvin's constitutional points lacked merit. Thereafter, a writ of habeas corpus was filed in the United States District Court and denied. The Court of Appeals for the Seventh Circuit affirmed on the ground that Indiana law would not hear an escapee, but one Judge expressed the view that Irvin had been denied due process on his trial.

At this point the Supreme Court granted certiorari and held that Irvin had exhausted his remedies under Section 2254 of Title 28 U.S.C. and allowed the writ under *Brown* v. *Allen*, 344 U.S. 443. Apparently, Professor Hart believes that the Court's opinion should have discussed *Daniels* v. *Allen*, 344 U.S. 443. There the counsel for the defendant neglected to appeal in time and a writ of habeas corpus alleging an unconstitutional conviction was dismissed for this reason only. Brown in his case *supra* "got a double measure of review, both state and federal, whereas Daniels got none".

The Professor's discussion of the *Daniels* case leaves me very confused. I conclude if the Court had discussed *Daniels*, Mr. Hart would have been happy to see it overruled. Personally it does not appeal to me as a precedent and knowing Mr. Justice Brennan has to carry the Court, I can forgive any ambiguity about the *Daniels* case in his opinion. It looks like good riddance of bad rubbish.

In my judgment, the discussion by Professor Hart of *Irvin* v. *Dowd* is not convincing and detracts dreadfully from what is otherwise an outstanding paper. As I have already indicated I think also his contention that the Court should refuse to take fact cases where Courts of Appeals presume to set aside jury verdicts was also a mistake.

Nevertheless and notwithstanding, Henry Hart deserves the greatest praise for this outstanding study. It took great courage to write as he did. Few professors do it and the low estate of American constitutional law can be directly attributed to it. Unless professors who study the Court speak out about it, the sufferers are the Court and the country. What else are professors for?

I think the Hart "foreword" in its presentation of the facts of Supreme Court congestion is a superb document. And every lawyer who argues a Supreme Court case should read and study it. Professors who sit smugly in their ivory towers and spout platitudes never make mistakes because no one can penetrate their airy persiflage to ascertain what they mean. Hart deserves the trade's highest medal even though he also collects a couple of Purple Hearts. Let those who have been so wounded adversely criticize him.

On October 23, 1959, the Seventh Circuit (Duffy, Schnackenberg and Castle) reheard *Irvin* v. *Dowd*, 271 F. 2d 552, and decided the constitutional points on the merits against Irvin, Judge Duffy dissenting. In *forma pauperis*, Irvin's case is now back on the Supreme Court calendar as No. 722 on the Miscellaneous Docket to be heard at the October, 1960, Term. Certiorari was granted on February 23, 1960; see 28 Law Week 3245.

Activities of Sections

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

Programs of the Committee on Developments in Business Financing, under the Chairmanship of Robert C. Barker, Chicago, and of the Section's Committee on Savings and Loan Associations, under the Chairmanship of David A. Bridewell, Chicago, will augment the Regional Meeting of the American Bar Association, in Portland, Oregon, on May 24.

The Portland program of the Committee on Business Financing will be a financial clinic for lawyers, entitled "Where To Look for Money", which Ray Garrett, Jr., Chicago, will moderate and at which Robert C. Barker will preside. Speakers at the clinic will include Homer Kripke, New York City, Larry D. Gilbertson, Washington, D. C., John Hawkinson, Des Moines, and other experienced experts representing various sources of capital and credit.

The Committee on Savings and Loan Associations will have breakfast and luncheon meetings, at which Ralph H. Cake and Robert Hazen, both of Portland, will be the principal speakers.

Speakers and their subjects at the Seminar on Savings and Loan Problems are: William C. Prather, Chicago, "Usury laws as they affect the operation of savings and loan associations"; Milton I. Baldinger, Washington, D. C., "Savings and loan tax problems"; Kenneth G. Heisler, Washington, D. C., "Procedure of Federal Home Loan Bank Board compared with procedures of other federal banking agencies"; Thomas Hal Clarke, Atlanta, "Financial institutions as secured creditors in federal bankruptcy court"; Boyd Ewing, Nevada, Missouri, "Retirement, pension, profit-sharing and deferred compensation contracts for savings and loan associations"; Judge John P. Clarke, Winslow, Arizona, "The need for better state savings and loan laws"; Charles M. Robson, Joliet, Illinois, "The role of counsel to a savings and loan association"; David Krueger, Chicago, "Confidential nature of savings and loan records"; Bryce Q. Curry, Washington, D. C., "Basic factors affecting Federal Home Loan Bank Board decisions"; and William F. McKenna, Los Angeles, "Capital stock savings and loan associations". David A. Bridewell will be Moderator.

"Business and Government" will be the central theme of various sessions of the Section and its committees at the Annual Meeting in Washington, D. C., August 26 to 31. In addition to addresses by distinguished representatives of business and government, the Section program will be notable for the Section's first annual reception and dinner dance. Since all members of the American Bar Association and their wives will be invited, members of the Section to be assured accommodations are urged to take advantage of the opportunity to purchase tickets in advance, applications for which will be mailed shortly.

The April issue of *The Business Lawyer* contains not only articles on practical subjects of importance to the business lawyer but also a symposium of opinions with respect to the proposed adoption by the Securities and Exchange Commission of Rule 155 as announced in Securities Act Release No. 4162. In addition to a definitive statement by Chairman Edward N. Gadsby of the Commission's reasons for their proposed Rule and comments by the members of the Section's Committee on Federal Regulation of Securities, of which Arthur H. Dean is Chairman, there are articles on the subject by Malcolm Fooshee and Edward F. McCabe, New York City, and by Fred B. Lund, Jr., Boston.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

The Council of the Section of International and Comparative Law and Committee Chairmen met during the Midyear Meeting on February 21, 1960, at the Edgewater Beach Hotel, Chicago. Reports of various committees were submitted and discussed. Plans were considered for the participation of the Section in the Portland Regional Meeting and for the Spring Meeting in Washington and the Annual Meeting next August.

For the Regional Meeting to be held in Portland, Oregon, the Section is arranging a panel discussion in conjunction with the Assembly Luncheon to be held on Monday, May 23. The Connally Amendment, or the self-judging aspect of the domestic jurisdiction reservation to our adherence to the charter of the International Court of Justice will be the subject before the panel. President-Elect Whitney North Seymour will serve as moderator of the program, and the speakers in favor of the maintenance of the Association's 1947 position with respect to the Connally Amendment, favoring its repeal, will be Lyman Tondel, Jr., of New York, Section Delegate to the House of Delegates, and Arthur Larson, Director of World Law Study Center at Duke University Law School. The speakers against repeal and in favor of retaining the Connally Amendment will be Alfred J. Schweppe, of Seattle, Washington, Chairman of the Standing Committee on Bill of Rights, and Roy E. Willy, of Sioux Falls, South Dakota, former Chairman of the House of Delegates.

The Spring Meeting of the Section will be held at the Mayflower Hotel, May 19, 1960, and the speaker will be former Attorney General Herbert Brownell, Jr.

All meetings of the Section at Washington during the Annual Meeting will be at The Statler Hilton. On Tuesday morning, August 29, a breakfast meeting is scheduled on comparative law with the Junior Bar Conference as co-sponsor. The Chairman will be Professor Willis L. M. Reese, of Columbia University, and Professor Frederick W. Lawson, of Brasenose College, Oxford, will speak on "Comparative Law: A Generalist's Apology".

In collaboration with the British Institute of International and Comparative Law, arrangements are being made

for a symposium on Judicial Assistance, and the English participants are scheduled to be Master J. B. A. Harwood and Lord Dunboyne. The luncheon speaker on August 29 will be Sir Edward Holroyd Pearce, Lord Justice of Appeal.

On August 30, the Section will participate in a joint program with the Section of Antitrust Law, which will deal with the subject "Impact of Foreign Antitrust Laws on American Business".

The Washington meeting will afford the Section the opportunity to reciprocate the many courtesies extended us during the Annual Meeting in London in 1957 by British lawyers.

SECTION OF TAXATION

The Membership Committee of the Section reported at the mid-winter meeting of Council and Committee Chairmen, held at the Edgewater Beach Hotel in Chicago on February 20-21, that the Section membership continues to show steady growth. As of the Miami meeting last August the membership totaled 7,028; the Section now has approximately 7,275 members and it is hoped that by next August the membership will have reached 7,500.

Lawyers whose practice involves federal tax matters will find the Bulletin of the Section and its *Annual Program* valuable aids in keeping up with important developments in that field. Through the Section's committee work program they may also take a direct part in helping to develop recommendations for legislative and administrative improvements in our tax laws.

Lawyers who are not directly concerned with federal taxes will be interested to learn that the Section also takes an active interest in problems of state and local taxation. This phase of the Section's work is spearheaded by its Committee on State and Local Taxation.

For example, that Committee began a multistate taxation project during the 1958-1959 year before the United States Supreme Court handed down its landmark *Northwestern-Stockham* opinion. At the Annual Meeting last August the Committee presented a Technical Session on the "State Taxation of Interstate Commerce". Three leading experts in the field presented their views in formal papers which were later printed in the January issue of the *Bulletin* of the Section. The Committee is now engaged, through numerous subcommittees, in a study of multistate net income, personal property, sales, use, and franchise taxes. Separate subcommittees have also been set up for the consideration of the multistate taxation of the transportation industry and for the drafting of a proposed congressional statute to set up standards governing state taxation so far as it involves the commerce and due process clauses of the Federal Constitution. There is also a subcommittee on co-operation to maintain informal liaison with other groups engaged in similar studies. Regardless of whether the Committee ultimately recommends the enactment of a broad federal statute, it will test the feasibility of various proposals by reducing them to proposed statutory language.

Any attorney wishing to participate in the work of the Committee on State and Local Taxes should communicate with either the Chairman of the Committee, Allen H. Gardner, American Security Building, Washington 5, D. C., or the Chairman of the Committee on Committees of the Section, Randolph W. Thrower, First National Bank Building, Atlanta 3, Georgia.

SECTION OF FAMILY LAW

The Family Law Section will be participating in the Portland, Oregon, regional meeting of the American Bar Association with a special session on May 25, which has been arranged by Judge William S. Fort, of Eugene, and Judge Joseph B. Felton, of Salem.

The program will consist of presentations by Presiding Judge Louis H. Burke, of Los Angeles County Superior Court, on "The Role of Conciliation in Divorce Cases"; by Dr. George Saslow, of the University of Oregon Medical School, on "A Psychiatrist Discusses Reconciliation and Counselling in Family Matters"; by Archibald M. Mull, Jr., Past President of the California State Bar Association, on "A Lawyer Looks at the Doctrine of Recrimination"; and President Judge Donald E. Long, of the Department of Domestic Relations, Multnomah County, Oregon, on "A New Approach to Family Problems—The Family Court".

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Washington, D. C.	August 29-September 2, 1960
St. Louis, Missouri	August 7-11, 1961
San Francisco, California	August 6-10, 1962

Board of Governors Meeting

Spring Meeting, Washington, D. C.	May 15-17, 1960
Fall Meeting, Chicago, Illinois	October 27-28, 1960

Section Chairmen

Annual Conference, Chicago, Illinois	October 29-30, 1960

Regional Meetings

Portland, Oregon	May 22-25, 1960
Houston, Texas	November 9-12, 1960